

TRANSCRIPT OF PROCEEDINGS
IN
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 340.

EDWIN F. HALE, APPELLANT.

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN CHARGE,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 22, 1902.

(19,342.)

(19,842.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 340.

EDWIN F. HALE, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of <i>habeas corpus</i>	1	1
Allowance of writ, &c.....	1	1
Petition for writ of <i>habeas corpus</i>	2	1
Exhibit A—Commitment	10	5
B—Order of commitment	12	7
C—Report of grand jury, May 5, 1905.....	13	7
Schedule A—Testimony of Edward F. Hale	18	10
Exhibit B— <i>Subpoena duces tecum</i> to E. E. Hale	23	13
D—Report of grand jury, May 8, 1905	27	15
Schedule one—Proceedings before Judge Lacombe.	30	17
Testimony of Edward F. Hale (re-		
sumed).....	33	19
Return of marshal.....	39	23
Bail bond	42	24

	Original.	Print
Opinion of Wallace, J.	46	26
Order discharging writ.....	60	35
Recognizance on appeal.....	62	36
Notice of appeal.....	66	38
Petition of appeal.....	68	38
Allowance of appeal.....	70	39
Assignment of errors.....	71	40
Bond for costs on appeal.....	78	43
Citation (copy).....	82	45
Clerk's certificate.....	84	46

1

Writ of *Habeas Corpus*.

The President of the United States to William Henkel, Esquire,
United States marshal for the southern district of New York,
Greeting:

We command you, that you have the body of Edwin F. Hale, by
you imprisoned and detained, as it is said, together with the time
and cause of such imprisonment and
(Seal of U. S. Circuit Court, detention, by whatsoever name he
Southern District, New shall be called or charged, before the
York.) circuit court of the United States in
and for the southern district of New
York, in the second circuit, on the 24th day of May, 1905, at 10.30
o'clock in the forenoon of that day, to do and receive what shall then
and there be considered concerning the said Edwin F. Hale; and
have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the
Supreme Court of the United States, the 13th day of May, one thou-
sand nine hundred and five.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States
for the Southern District of New York.

The foregoing writ is hereby allowed. The petitioner may be ad-
mitted to bail in the sum of \$1,000, pending the proceedings thereon.

WM. J. WALLACE,
United States Circuit Judge.

2

Petition.

To the circuit court of the United States in and for the southern dis-
trict of New York, in the second judicial circuit:

The petition of Edwin F. Hale respectfully shows:

I. That your petitioner is a citizen of the United States, an inhab-
itant and citizen of the State of New York, and a resident of the city
of New York, in this circuit and district.

II. That your petitioner is now, and for upwards of a year has
been, continuously, a director, and the secretary and treasurer of the
McAndrews and Forbes Company, a corporation duly organized and
existing under and by virtue of the laws of the State of New Jersey.

III. That your petitioner is now actually imprisoned and re-
strained of his liberty and detained by color of the authority of the
United States, in the custody of William Henkel, Esquire, United
States marshal in and for the southern district of New York, to wit,
at the borough of Manhattan, of the city of New York, in the said
district.

IV. That the sole claim or authority by virtue of which the said William Henkel, marshal as aforesaid, so restrains and detains your petitioner, is a certain commitment in writing, a copy of which is hereto annexed marked "A."

V. That the said commitment was issued pursuant to an order of this court made and entered at a stated term thereof held at the post office building in the city of New York on the 8th day of May, 1905, a copy of which said order is hereto annexed marked "B."

3 VI. That the said last mentioned order was made and based solely and exclusively, upon two certain presentments or reports presented to and filed in this court by the grand jury of the United States for the southern district of New York, on the 5th and 8th days of May, 1905, respectively, copies of which said presentments or reports (which are referred to and described in the said last mentioned order as "charges of contempt") are hereto annexed, marked "C" and "D," respectively.

VII. That your petitioner's imprisonment, restraint and detention are without authority of law whatsoever, and in violation of his rights, privileges and immunities under the Constitution and laws of the United States, for the following reasons:

(a.) This court was without jurisdiction under the said Constitution and laws, by reason of any of the matters or things contained and set forth in the said presentments or reports of the grand jury, or either of them, to entertain any charge or charges of contempt against your petitioner, or to act or proceed in any manner in the premises.

(b.) At the time your petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was no "cause" or "action" of any kind whatever depending in this court between the United States and the corporations named in the *subpoena duces tecum*, a copy of which is annexed to Exhibit "C," in which your petitioner could be required under the said Constitution and laws, to testify or give evidence before the grand jury.

4 (c.) The grand jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set out in the said reports or presentments, the powers of a Federal grand jury being limited under the Constitution to the investigation of specific charges against particular persons, and there being under investigation by the grand jury at the time your petitioner attended before them no specific charges against any particular person; consequently its requirement that your petitioner should testify and produce documentary evidence, and the orders of the court based thereon, were *coram non judice* and void.

(d.) Section 1 of the legislative, executive and judicial appropriation act for the fiscal year ending June 30, 1904, approved February 25, 1903, being chapter 755 of the United Statutes of 1903 (32 Stat., 904), providing, among other things, that no person shall be prosecuted, or be subjected to any penalty or forfeiture, for or on account of any

transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under the acts therein mentioned, does not give your petitioner immunity from prosecution, for or on account of transactions, matters or things concerning which he was directed to testify and produce evidence before the grand jury, the investigation herein before that body upon which he was required to testify and produce said papers and documents not being a proceeding, suit or prosecution under either of the acts referred to in the act of February 25, 1903; consequently your petitioner was privileged under the Constitution and laws of the United States, and particularly by the 5th amendment to the said Constitution, to refuse to testify or produce evidence before the grand jury upon the said investigation, when

by so doing he might criminate himself, as he avers, he might
5 have, had he given the testimony or produced the papers and documents as required by the grand jury and the court.

(e.) The said act of February 25, 1903, is unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things constituting violations of the laws of the United States, on condition that they will, when so required, testify and produce evidence, documentary or otherwise, concerning such violations in proceedings, suits or prosecutions under the three statutes mentioned therein, thus usurping and infringing upon the pardoning power exclusively vested in the President by the express terms of section 2, of article II of the Constitution of the United States, and which is not subject to legislative control; consequently the said act does not operate to deprive your petitioner of his right under the constitutional provision above mentioned to refuse to criminate himself.

(f.) The said act of February 25, 1903, is also unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, provided such persons testify or produce evidence, documentary or otherwise, concerning such transactions, matters and things, in proceedings, suits or prosecutions under the three acts before mentioned, thus infringing upon and setting at naught the express provisions of article X of the amendments to the Constitution of the United States that the powers not delegated to the United

States by the Constitution, nor prohibited by it to the States,
6 of which the right to prosecute and punish offenders against their own peace and dignity is one, are reserved to the States, respectively, or to the people.

(g.) The said act of February 25, 1903, is further unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things, notwithstanding such transactions, matters or things may constitute violations of the laws of the various States, provided such persons testify and produce evidence, documentary or otherwise, concerning

such transactions, matters or things in proceedings, suits or prosecutions under the statutes therein mentioned, thus usurping the power expressly reserved to the States by article X of the amendments to the Constitution of the United States to grant or withhold pardons, and to provide for and deal with the granting or withholding thereof, in accordance with their own constitutions and laws.

(h.) The act of February 25, 1903, contains no requirement that a person shall testify or produce evidence in proceedings, suits or prosecutions under the three acts notwithstanding such testimony or production may tend to criminate him; therefore its only effect is to render testimony incompetent as evidence when the person giving it has voluntarily waived his constitutional privilege, whereas before the passage of the act such testimony could have been used against the person giving it.

(i.) The court's order of May 5th, directing your petitioner forthwith to produce the papers called for by the *subpoena duces tecum* was made in violation of your petitioner's rights under the fourth amendment to the Constitution of the United States providing that
7 the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated.

(j.) The said order of May 5th was, in effect, a warrant to search for and seize the papers mentioned in the said *subpoena duces tecum*, and not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe the place to be searched or the things to be seized, its issuance constituted a violation of the said fourth amendment.

(k.) The papers mentioned in the said *subpoena duces tecum* being the property of the McAndrews and Forbes Company and in your petitioner's custody solely by reason of his official relations toward that company, the compulsion of said subpoena, and of the order that he produce such papers thereunder would, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation, in violation of its rights under the said fourth amendment, which it was in your petitioner's duty as such officer and custodian to protect by lawful means, as he is now doing.

(l.) The production of the said papers being required of your petitioner in his capacity of officer and director of the said corporation, and the order of May 5th so requiring, not being issued upon probable cause, or supported by oath or affirmation, and failing to particularly describe the place to be searched, or the things to be seized, its issuance constituted a violation of the said fourth amendment; consequently, not only was your petitioner under no legal
8 obligation to enforce or obey the same, but his duty as such officer and director required him to disobey it.

VIII. Your petitioner is advised by counsel and verily believes that for the reasons above stated the order adjudging him guilty of contempt and his commitment pursuant to said order to the custody of the marshal were without legal right, authority or jurisdiction of

any kind, and are utterly void and ineffectual, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges and immunities thereunder.

Wherefore your petitioner prays that a writ of *habeas corpus* may issue directed to the said William Henkel, Esquire, marshal as aforesaid, or to any of his deputies, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this court may proceed in a summary way to determine the facts of the case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice require.

And your petitioner will ever pray.

Dated at the city of New York the 11th day of May, 1905.

NICOLI, ANABLE & LINDSAY,
Attorneys for the Petitioner.

Office and post-office address, 31 Nassau street, Manhattan, New York, N. Y.

9 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

Edwin F. Hale being duly sworn deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWIN F. HALE.

Sworn to before me this 11th day of May, 1905.

[SEAL.] E. MORTIMER BOYLE,
Notary Public, New York County.

10 "A."

Circuit Court of the United States, Southern District of New York.

In the Matter of EDWIN F. HALE, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness Edwin F. Hale, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court,

upon the fifth day of May, 1905, and the said witness, on that day, appearing in person, in open court, and having been ordered by the court to answer said questions and produce said papers and documents; and further charges of contempt having been presented by the said grand jury, on the eighth day of May, 1905, showing that, after the making of the said order of May fifth, 1905, the said witness appeared before the said grand jury and again refused to answer the said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, filed herein on the fifth day of May, 1905,

and the eighth day of May, 1905, respectively; and the said
11 Edwin F. Hale having again appeared in person, in open court, on the said eighth day of May, 1905, and been heard, and an order having, thereupon, been made, in writing, by this court, on the eighth day of May, 1905, wherein it was considered, ordered and adjudged by this court that the said Edwin F. Hale be adjudged to have committed the contempt alleged, and that he be fined the sum of five dollars (\$5.00), and that he be committed to the custody of the marshal until he complies with the aforesaid order of the court, by answering the said questions and producing said papers and documents, or be discharged by due process of law;

This, therefore, is to command the United States marshal, for the southern district of New York, to take and receive the said Edwin F. Hale into his custody, in pursuance of the aforesaid order, and to detain him until he be legally discharged.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eleventh day of May, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

JOHN A. SHIELDS,

Clerk of the Circuit Court of the United States of
America for the Southern District of
New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
United States Circuit Court.

12

"B."

At a stated term of the circuit court of the United States, held at the post office building, in the city of New York, on the 8th day of May, 1905.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of EDWIN F. HALE, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness Edwin F. Hale, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court, upon the fifth day of May, 1905, and the said witness, on that day, appearing in person in open court, and having been ordered by the court to answer said questions and produce said papers and documents; and further charges of contempt having been presented by the said grand jury, on the eighth day of May, 1905, showing that,

13 after the making of said order of May fifth, 1905, the said witness appeared before the said grand jury and again refused to answer said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, filed herein on the fifth day of May, 1905, and the eighth day of May, 1905, respectively; and the said Edwin F. Hale having again appeared in person, in open court, on the said eighth day of May, 1905, and been heard, it is now

Considered, ordered and adjudged by the court that the said Edwin F. Hale be, and he is hereby, adjudged to have committed the contempt alleged; that he be, and he hereby is, fined the sum of five dollars (\$5.00); and that he be committed to the custody of the marshal, until he complies with the aforesaid order of the court, by answering said questions and producing said papers and documents, or is discharged by due process of law.

May 8, 1905.

E. HENRY LACOMBE, U. S. C. J.

A copy.

[SEAL.] JOHN A. SHIELDS, Clerk.

"C."

NEW YORK CITY, N. Y., May 5th, 1905.

To the Hon. E. Henry Lacombe, judge of the United States circuit court for the southern district of New York.

14 SIR: The grand jury for the March term, 1905, respectfully represents to your honor, and charges, that Edward F. Hale is guilty of contempt of court, in this, to wit: That upon the

28th day of April, 1905, a subpoena, in due form, was served upon the said Edward F. Hale, commanding him to appear before the said grand jury, at a certain time named in the said subpoena, to wit: on the second day of May, 1905 (a copy of which subpoena is annexed to the transcript of the minutes of the said grand jury which transcript is hereunto annexed and made a part hereof), to testify and give evidence in a certain matter then under investigation before the said grand jury, and to produce, at the said time and place, various books, letters, memoranda and other writings, all of which are specifically enumerated and set forth in the said subpoena hereto annexed, to which reference is hereby made, and which is hereby made a part hereof.

That the said Edward F. Hale appeared before the said grand jury, on the said second day of May, 1905, in obedience to the said subpoena, but failed and refused, and still fails and refuses, to produce before the said grand jury the aforesaid books, letters, memoranda and other writings, or any of them.

That the said books, letters, memoranda and other writings, are material to an investigation being conducted before the said grand jury.

That the said Edward F. Hale, on the said second day of May, 1905, further failed and refused, and still fails and refuses, to answer certain questions pertinent to the said investigation and material thereto, which questions were propounded to the said Edward F. Hale, before the said grand jury, by Mr. Henry W. Taft, an assistant to the United States attorney for the southern district of New York, who was then in attendance before the said grand jury and was conducting the said investigation in behalf of the said grand jury, which said questions are as follows:

(1.) Having been asked the question, "What is your business?" and having answered, "I am secretary and treasurer of MacAndrews & Forbes Company," he was asked the following question: "That company is engaged in what business?" which question the said Edward F. Hale then and there refused to answer; and the witness was thereupon asked the following further questions, and did then and there fail and refuse to answer the same, to wit:

(2.) "What business were you in before you came to New York city?"

(3.) "Who is president of the MacAndrews & Forbes Company?"

(4.) "What is the business of the MacAndrews & Forbes Company?"

(5.) "Where is their office?"

(6.) "And where is the office of the American Tobacco Company?"

(7.) "Who is president of the American Tobacco Company?"

(8.) "Is there any agreement, or understanding, or arrangement, between the American Tobacco Company and MacAndrews & Forbes Company, in relation to the trade or business in licorice,

licorice paste or licorice mass, affecting the business between several States of the United States?"

(9.) "Do you know a company by the name of J. S. Young Co.?"

16 (10.) "Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?"

(11.) "Are you in the employment of the American Tobacco Company?"

That a copy of the minutes of the proceeding before the grand jury, at which the said Edward F. Hale attended as aforesaid, and at which he failed and refused to produce the said books, letters, memoranda and other writings, and at which he failed and refused to answer the aforesaid questions, is hereto annexed, the same being a true and correct transcript of the minutes of the said proceeding, and of the whole thereof, marked "Schedule A," and made a part hereof.

That the witness was duly advised, at the time and place aforesaid, that the proceeding then pending before the said grand jury was a proceeding under the so-called Sherman act, being "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Statutes, 209, First Supplement U. S. Revised Statutes, 726, *et seq.*, and the acts amendatory thereof and supplementary thereto, and, particularly, chapter 755 of the Laws of 1903, approved February 25th, 1903; and he was then and there further advised that, under the last named act, no person shall be prosecuted, or subjected to any penalty or forfeiture, for, or on account of, any transaction, matter or thing concerning which he may testify, or produce evidence, in any proceeding, suit or prosecution under the said act—that is to say, under the Sherman act—under which the aforesaid proceeding was brought; provided, however, that no person so testifying shall be exempted from prosecution or punishment

17 for perjury committed in so testifying; and the said Edward F. Hale was then and there further advised by Mr. Henry W. Taft, an assistant to the United States attorney for the southern district of New York as aforesaid, as follows:

"I also advise you that it is the purpose not to proceed to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you are now asked to testify to, or produce evidence, documentary or otherwise, regarding it in this proceeding, and that I offer you, and assure you, immunity and exemption for any such testimony that you may give."

And the said Edward F. Hale was, thereupon, asked the following question by Mr. Henry W. Taft, assistant to the United States attorney for the southern district of New York, as aforesaid, to wit: "Do you decline to answer the questions which have been put to you?" to which question the said Edward F. Hale then and there answered, "I must respectfully decline to answer;" and, thereupon, the said Mr. Henry W. Taft, assistant to the United States attorney for the

southern district of New York, as aforesaid, asked the said Edward F. Hale the following question: "You decline to answer all of the questions which have been put to you, on the ground that you have stated, in relation to each of the questions?" to which question the said Edward F. Hale then and there answered: "I do."

That each of the said questions was pertinent to the said investigation and proceeding then pending before the said grand jury and was material thereto.

Wherefore, the said grand jury charges that the said Edward F. Hale is in contempt of court, and asks that such proceedings may be had as are, in the premises, in accordance with law.

THOS. W. FOLSOM, Foreman.
NELSON F. GRIFFIN, Secretary.

SCHEDULE A.

Before the United States Grand Jury.

THE UNITED STATES	}
vs.	
AMERICAN TOBACCO COMPANY and McANDREWS & FORBES COMPANY.	

NEW YORK, May 2, 1905.

Appearances.

Henry W. Taft, Esq., assistant United States attorney.
Felix H. Levy, Esq., assistant United States attorney.
William S. Ball, Esq., assistant United States attorney.

EDWARD F. HALE, being duly sworn, testified as follows:

19 The witness presented a typewritten statement containing his reasons for not giving evidence in this proceeding.

Examined by Mr. TAFT:

Q. What is your name?

A. Edward F. Hale.

Q. Mr. Hale, where do you reside?

A. New York city.

Q. How long have you resided here?

A. I have lived here three years.

Q. Where did you reside before that?

A. In Louisville, Kentucky.

Q. What is your business?

A. I am secretary and treasurer of MacAndrews & Forbes Company.

Q. That company is engaged in what business?

A. I shall have to respectfully decline to answer further questions, on the grounds, first, that there is no legal warrant or authority for my examination as a witness, and, second, that my answers may tend to criminate me.

Q. What business were you in before you came to New York city?

A. I shall have to decline to answer further questions on the same grounds.

Q. Who is the president of the MacAndrews & Forbes Company?

A. I shall only have to repeat what I said before.

Q. You decline?

A. I decline to give further testimony on the grounds mentioned.

Q. What is the business of the MacAndrews & Forbes Company?

A. I shall give the same answer to that.

Q. Where is their office?

A. I shall repeat the answer as given before.

Q. And where is the office of the American Tobacco Company?

A. The same answer to that question.

Q. Who is the president of the American Tobacco Company?

A. I give the same answer to that question.

20 Q. Is there any agreement or understanding or arrangement between the American Tobacco Company and MacAndrews & Forbes Company in relation to the trade or business in licorice, licorice paste, or licorice mass, affecting the business between several States of the United States?

A. I must decline to answer, for the reason stated.

Q. Please state them again.

A. First, that there is no legal warrant or authority for my examination as a witness, and, second, that my answers may tend to criminate me.

Q. You appear here by virtue of a subpoena served upon you, do you not?

A. I do.

Q. Have you the subpoena here?

A. I have not.

Q. Have you produced the papers which are called for in that subpoena?

A. I have not produced the papers and documents, first, because it would have been a physical impossibility for me to have gotten them together within the time allowed, and, second, because I am advised by counsel that upon the facts as they now appear I am under no legal obligation to produce anything called for by the subpoena, and, third, because they may tend to criminate me.

Q. These papers which you have been asked to produce are the ones mentioned on the paper which I now show you?

A. This seems to be a copy of the summons that was served upon me.

Paper referred to by witness marked Exhibit A of this date.

Mr. TAFT: We will produce the return to the subpoena, showing the record of the papers asked for.

Q. Have you brought any of the papers called for by that subpoena?

A. I have not.

21 Q. Any of the documents, books, papers, memoranda, correspondence called for by that subpoena?

A. I have not.

Q. Do you know a company by the name of J. S. Young Company?

A. I must decline to answer the question; for the reasons given before.

Q. Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?

A. I must decline to answer the question for the reasons stated.

Q. Are you in the employment of the American Tobacco Company?

A. I must decline to answer, for the same reasons.

Q. Is your subpoena in this building?

A. I don't know.

Q. Do you wish to produce it?

A. I must decline to answer, for the reasons stated.

Q. Did you deliver the subpoena to your counsel?

A. Yes.

Q. Your counsel are in the building, are they not?

A. I suppose so.

Q. Will you get the subpoena from your counsel and bring it into the grand jury room?

A. Is it not in order for your marshal to get it?

Q. I am asking for the subpoena that was served upon you, that is the copy of the subpoena which was served upon you. Will you procure that from your counsel and produce it here for the grand jury?

A. I will do so.

Q. Will you kindly do so now?

A. I shall try, now.

Witness leaves the room and returns with copy of subpoena, which he delivers to Mr. Taft.

Copy of subpoena marked Exhibit B of this date.

22 Q. You discover, do you not, that the documents which are mentioned on the list which I handed you a moment ago correspond to those which appear upon this copy of the subpoena which you have now produced?

A. I think it is a carbon copy, is it not?

Q. If you will answer the question, "I do not know," I will ask the stenographer to incorporate in the record the documents as stated in the question, and I will again ask you if you have produced any of the arrangements, correspondence, memoranda, formal agreements, or writings, letters or telegrams, reports or accounts, or

any of the letters or copies of letters or other papers enumerated in the *subpoena duces tecum*?

A. I confirm my answer to similar questions, previously given.

Q. You say that you have not produced any?

A. I have not.

Q. For the reasons which you have previously stated?

A. For the reasons previously stated.

Q. Mr. Hale, I desire to advise you that this is a proceeding under the so-called Sherman act, being an act to protect trade and commerce against unlawful restraints and monopolies, 26 Statutes, 209, 1 Supplement Revised Statutes, 762 and following, and the acts amendatory thereof and supplementary thereto, and particularly chapter 755 of the Laws of 1903, approved February 25, 1903, and I also advise you that under the last-named act, no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, in any proceeding, suit or prosecution under the said act. That is, referring to the Sherman act, under which this prosecution is brought; provided, however, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

23 And I also advise you that it is the purpose not to proceed to prosecute you, or subject you to any penalty or forfeiture on account of anything that you are now asked to testify to or produce evidence documentary or otherwise regarding it, in this proceeding, and I offer you and assure to you immunity and exemption for any such testimony that you may give. Do you still decline to answer the questions which have been put to you?

A. I must respectfully decline to answer.

Q. You decline to answer all the questions that have been put to you on the grounds which you have stated, in relation to each of the questions?

A. I do.

Recess declared, until 2 p. m., same day.

After recess, hearing is adjourned to Friday, May 5th, 1905, at two o'clock, p m.

EXHIBIT B, MAY 2/05.

The President of the United States of America to E. E. Hale, 111 Fifth avenue, N. Y. city, Greeting:

We command you, that all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the people of the United States of America, for the southern district of New York, at a circuit court, to be held in the U. S. court and New York post office building, in the borough of Manhattan, city of New York, in and for the said southern district of New York, on the 2nd day of May, 1905, at 11 o'clock in the fore-

noon, to testify and give evidence in a certain action now pending undetermined in the circuit court of the United States for the southern district of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company on the part of the United States and that you bring with you and produce at the time and place aforesaid,

(1.) All understandings, agreements, arrangements or contracts whether evidenced by correspondence, memoranda, formal agreements or other writings, between MacAndrews & Forbes Company and either of the following persons, firms, or companies, from the date of the organization of the said MacAndrews & Forbes Company :

J. S. Young Company,
J. D. Lewis,
American Licorice Company,
National Licorice Company,
Meller & Rittenhouse,
Stamford Manufacturing Company.

(2.) All correspondence, by letter or telegram (including copies of all letters or telegrams sent by said MacAndrews & Forbes Company, or any of its officers, employees, agents or other representatives) between MacAndrews & Forbes Company and the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company :

J. S. Young Company,
J. D. Lewis,
American Licorice Company,
National Licorice Company,
Meller & Rittenhouse,

Stamford Manufacturing Company.

25 (3.) All reports made, or accounts rendered, to MacAndrews & Forbes Company, by the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company :

J. S. Young Company,
J. D. Lewis,
American Licorice Company,
National Licorice Company,
Meller & Rittenhouse,
Stamford Manufacturing Company.

(4.) Any agreement or agreements, contract or contracts, arrangement or arrangements (whether evidenced by correspondence, telegrams, memoranda or formal written instrument) between MacAndrews & Forbes Company and the Amsterdam Supply Company, or the American Tobacco Company, or the Continental Tobacco Company or Consolidated Tobacco Company, from the date of the organization of the said MacAndrews & Forbes Company.

(5.) Any and all letters received by the MacAndrews & Forbes

Company, since the date of its organization, from any of the following named persons, firm- or companies :

- Strater Brothers, Louisville, Kentucky.
 Monarch tobacco works, Louisville, Kentucky.
 H. N. Martin Tobacco Company, Louisville, Kentucky.
 Day and Night Tobacco Company, Cincinnati, Ohio.
 E. O. Eshelby & Company, Cincinnati, Ohio.
 Frischmuth Brothers & Company, Philadelphia, Pa.
 Daniel Scotten Tobacco Company, Detroit, Michigan.
 R. A. Patterson & Company, Richmond, Virginia.
 26 Larus & Brother Company, Richmond, Virginia.
 United States Tobacco Company, Richmond, Virginia.
 P. Lorillard Company, Jersey City, New Jersey.
 R. J. Reynolds & Company, Winston, North Carolina.
 P. H. Mayo Company, Richmond, Virginia ;

and, also, copies of all letters and telegrams sent by the McAndrews & Forbes Company, since the date of its organization, to either of the said persons, firms or companies; and all contracts, agreements or arrangements between the said McAndrews & Forbes Company and any of the said persons, firms or companies, whether such agreements, contracts or arrangements are evidenced by correspondence, telegrams, memoranda or written instruments now in your custody, and all other deeds, evidences and writings, which you have in your custody or power concerning the premises. And for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit two hundred and fifty dollars in addition thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, the 28th day of April, 1905.

(S'g'd)

JOHN A. SHIELDS, Clerk.

27

"D."

UNITED STATES OF AMERICA,
 Southern District of New York, City and }
 County of New York.

MAY 8TH, 1905.

To the Honorable E. Henry Lacombe, judge of the United States circuit court for the southern district of New York :

The grand jury for the March term, 1905, respectfully represents to your honor, and charges, that Edwin F. Hale is guilty of contempt of court, in this: that,

Whereas, on the twenty-eighth day of April, 1905, a subpoena, in due form, was duly served upon the said Edwin F. Hale, commanding him to appear before the said grand jury, at a certain time named in the said subpoena, to wit, on the second day of May, 1905,

to testify and give evidence in a certain matter then under investigation before the said grand jury, and to produce, at the said time and place, various books, letters, memoranda and other writings, all of which were specifically enumerated and set forth in the said subpoena; and,

Whereas, the said Edwin F. Hale did appear before the said grand jury, on the said second day of May, 1905, in obedience to the said subpoena; but did fail and refuse to produce, before the said grand jury, the aforesaid books, letters, memoranda and other writings; and the said books, letters, memoranda and other writings, were then, and now are, material to an investigation being conducted before the said grand jury; and,

Whereas, the said Edwin F. Hale, did, on the said second day of May, 1905, further fail and refuse to answer certain questions
28 pertinent to the said investigation, and material thereto propounded to him by the said grand jury; and,

Whereas, the said grand jury did, on the fifth day of May, 1905, duly present the foregoing facts to this honorable court, by a presentment in writing, duly signed by the said grand jury, by and through Thomas W. Folsom, Esq., its foreman, and Nelson F. Groffin, Esq., its secretary, which presentment in writing was duly filed in the office of the clerk of this court on said fifth day of May, 1905, and to which presentment, for greater particularity, reference is hereby made, and the same is hereby made a part hereof, in the same manner as if the same were here repeated at length; and,

Whereas, your honor did, on the said fifth day of May, 1905, duly consider the said presentment, and the said Edwin F. Hale being then present, in open court, your honor did, then and there, make the following order, to wit:

"The witness is hereby directed to answer the questions as propounded by the grand jury, and forthwith to produce the papers. Having made that presentment, he may now withdraw with the grand jury and see what the result is."

That thereupon, and in obedience to the said order, the said grand jury did thereupon withdraw to the grand jury room, together with the said Edwin F. Hale, and thereupon the said Edwin F. Hale was again asked the questions which were set forth in the said presentment, and which the said Edwin F. Hale had failed and refused to answer as aforesaid; and the said Edwin F. Hale was further then and there asked to produce the books, letters, memoranda and other writings called for by the *subpoena duces tecum* served upon him as aforesaid, and which books, letters, memoranda and other writings

the said Edwin F. Hale had failed and refused to produce
29 before the said grand jury, as set forth in the said presentment, duly filed herein on the fifth day of May, 1905, as aforesaid; that the said Edwin F. Hale did, then and there, again fail and refuse to answer the said questions, and did, then and there, fail and refuse to produce the said books, letters, memoranda and other writings, which said questions the said Edwin F. Hale had

been directed by the court herein, as aforesaid, to answer, and which said books, letters, memoranda and other writings, the said Edwin F. Hale had been directed by the court herein, as aforesaid, to produce.

That a copy of the minutes of the proceeding before the grand jury, held on the said fifth day of May, 1905, as aforesaid, and at which the said Edwin F. Hale did again fail and refuse to answer the questions which he was directed by the court herein to answer as aforesaid, and at which he failed and refused to produce the books, letters, memoranda and other writings which he was directed by the court herein to produce, is hereunto annexed, the same being a true and correct transcript of the minutes of the said proceeding, and of the whole thereof, and marked "Schedule One," and made a part hereof.

That the said books, letters, memoranda and other writings, were then, and now are, material to an investigation being conducted before the said grand jury, and that the said questions propounded to the said Edwin F. Hale, as aforesaid, were and are pertinent to the said investigation and material thereto.

Wherefore, the said grand jury charges that the said Edwin F. Hale is in contempt of court, and asks that such proceedings may be had as, in the premises, are in accordance with law.

THOS. W. FOLSOM, Foreman.

NELSON F. GRIFFIN, Secretary.

30

SCHEDULE ONE.

UNITED STATES
vs.
AMERICAN TOBACCO Co. and Ans. }

NEW YORK, May 5, 1905.

Met pursuant to adjournment.

Present: The grand jury, Mr. Taft, Mr. Levy, Mr. Ball.

The grand jury and the counsel repair to the rooms of the United States circuit court, and appear before Hon. E. Henry La Combe, circuit judge.

In this hearing before Judge Lacombe, De Lancey Nicoll, Esq., counsel for the defendants also appeared.

The COURT: Is the grand jury here?

The clerk calls the roll of the grand jury.

The CLERK: Have you any bills to present to the court?

The FOREMAN: Yes (hands paper up to the court).

The COURT: There is a clause here that reads: "And thereupon the said Henry W. Taft, assistant," etc., "asked the following questions," and you declined to answer all the questions which had been put to you, on the grounds which you have stated.

Mr. TAFT: It appears in the minutes and the papers which are attached as exhibits or schedules in the case. The witness himself stated from a typewritten paper, the grounds upon which he based his declination to answer.

The COURT: Was it the same ground?

Mr. TAFT: He repeated the grounds by reference back—except in the case of the documents he was asked to produce, and in relation to those he re-stated these grounds, and further stated the ground that they were too voluminous for him to produce within the time limited, and at the same time stated that there was no warrant for the proceedings, and that the production of the papers would tend to incriminate, or criminate him. I ask that the court adopt this procedure, for which I understand he has a precedent in a case which went to the United States Supreme Court, of *Brown vs. Walker*, under the interstate commerce law. In that case the court directed the witness forthwith to answer the questions and also forthwith to produce the papers described in the subpoena, and then the grand jury re-assembled and the witness was again asked the questions, declined to answer, and then the record was in shape for presentation to the court; with the direction that he show cause why he should not be committed for contempt. I ask that that procedure be followed in this case, as the term of this grand jury is about to expire, and that the question which has been raised may be argued deliberately by the counsel who have presented these objections.

I may say, the witness is now in court, having accompanied the grand jurors to the court room, and is here ready for the direction of the court.

Mr. NICOLL: Mr. Parker, Mr. Lindsay and myself represent the witness, and that form of procedure seems satisfactory to us.

The COURT: There is no other way. Has the matter been put in such shape?

Mr. TAFT: Then I will ask that the court direct the witness forthwith to answer all of the questions here stated in the return of the grand jury, or the presentment of the grand jury, and also that he forthwith—

The COURT: All the things enumerated in the subpoena?

Mr. TAFT: Enumerated in the subpoena; yes. And if it pleases the court, the grand jury will then retire. That presentment is here, and now made—

Mr. NICOLL: One moment. We have never seen the record.

Mr. TAFT: You will see it in time.

The COURT: The witness is hereby directed to answer the questions as propounded by the grand jury, and forthwith to produce the papers. Having made that presentment, he may now withdraw with the grand jury, and see what the result is. I suppose you wish me to wait for the return.

Mr. TAFT: No; if your honor please, it will be necessary to make

33 up the written return upon this next examination, and we will re-assemble the grand jury on Monday, in order that that return may be properly certified by the foreman, and it will then be presented.

Mr. NICOLL: Why not stipulate now that he has been directed, and that they have assembled.

The COURT: In criminal proceedings, stipulations don't answer the purpose. A defendant could not stipulate away his rights.

The grand jurors, the counsel for the Government, and the witness, Edwin F. Hale, then returned to the grand jury room.

EDWIN F. HALE—Examination resumed:

By Mr. TAFT:

Q. You have been directed by Judge Lacombe of the circuit court, to answer the questions which were propounded you by me on May 2nd. Do you so understand?

A. I do.

Q. You have also been directed by the court to produce the papers, documents, correspondence, memoranda, formal agreements, understandings in writing, other writings, reports, accounts, and all other papers here enumerated in the *subpoena duces tecum* heretofore served upon you and which subpoena you produced at the session of this grand jury held on May 2nd, 1905. Do you so understand?

A. I do.

Q. I now repeat the questions which were asked you at the last session. What is your name?

A. Edwin F. Hale.

34 Q. It was stated before to be Edward?

A. Probably misunderstood. Edwin is correct.

Q. Mr. Hale, where do you reside?

A. In New York city.

Q. How long have you resided there?

A. About three years.

Q. Where did you reside before that?

A. In Louisville, Kentucky.

Q. What is your business?

A. I am secretary and treasurer of the McAndrews & Forbes Company.

Q. What business is that company engaged in?

A. For the reasons mentioned in the statement filed by me with this grand jury on May 2nd, I must again respectfully decline to answer further questions.

Q. What business were you in before you came to New York city?

A. I must repeat the same answer, as given to the last question.

Q. You decline to answer?

A. I decline to answer.

Q. Who is the president of the McAndrews & Forbes Company?

A. I still decline to answer, for the reason stated.

Q. What is the business of McAndrews & Forbes Company?

A. The same response.

Q. Where is their office?

A. The same response to that question also.

Q. That is that you decline to answer?

A. I decline to answer, for the reasons stated.

Q. Where is the office of the American Tobacco Company?

A. I give the same response to that question.

Q. Who is the president of the American Tobacco Company?

A. The same response to that question also.

Q. You decline to answer?

A. Yes, sir.

35 Q. Is there any agreement or understanding or arrangement between the American Tobacco Company and MacAndrews & Forbes Company, in relation to the trade or business in licorice, licorice paste or licorice mass, affecting that business between several States of the United States?

A. For the reasons given before, I decline to answer.

Q. That is, I understand your reasons to be that there is no legal warranty or authority for your examination as a witness, and second that your answers may tend to criminate you?

A. Yes; as is fully set forth in the statement submitted on May 2nd.

Q. When you say the reasons set forth in the statement, to which statement do you refer?

A. I can repeat those.

Q. Have you got that statement?

A. I think I have (handing paper to counsel).

Q. These are the reasons contained in this statement?

A. Yes, sir.

Q. To wit?

A. (Reading :) "Before being sworn, I respectfully ask to be advised of the nature and purpose of the investigation in which I have been summoned here, whether it is under any statute of the United States, and the specific charge, if any has been made, in order that I may learn whether or not the grand jury has any lawful right or authority to make the inquiry, and whether there is anything lawfully pending here upon which witnesses may be summoned, sworn and examined; and I also ask that I be furnished with a copy of the complaint, information or proposed bill of indictment, if any, upon which you are acting, in order that I may know concerning what transactions, matters or things I am called upon to testify or produce evidence. My subpoena requires me to attend and testify and give evidence in a certain action now pending and

36 undetermined in the circuit court of the United States for the southern district of New York between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States, and to produce various papers and documents. I am informed that there is no

action now pending in the circuit court between the Government and the corporations named, and the vague and general description of the papers and documents leads me to suppose that the grand jury is investigating no specific charge against any one. If that is the fact, my counsel advise me that I ought not to obey the summons or submit to examination." And my reasons as stated on May 2nd, were first, that there is no legal warrant for my examination, as a witness, and second, that my answers may tend to criminate me.

Q. You appear here by virtue of a subpoena served upon you, do you not?

A. I do.

Q. And you appeared at the last hearing by virtue of a *subpoena duces tecum* served upon you?

A. That is correct.

Q. Have you produced the papers, those that were called for by that subpoena?

A. I have not.

Q. And did you not produce them at the last hearing?

A. I did not.

Q. Do you decline to produce them?

A. I do, for the reasons stated heretofore.

Q. For the reasons stated at the last session of the grand jury?

A. That is correct.

Q. They are the papers which are mentioned in the subpoena which was served upon you?

A. Those are the ones that I declined to produce.

Q. Have you brought any of the papers mentioned in that subpoena?

A. I have not.

Q. Do you know a company by the name of J. S. Young Company?

A. I must decline to answer that question for the reasons stated.

37 Q. Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?

A. I must decline to answer that question for the same reasons.

Q. Are you in the employment of the American Tobacco Company?

A. I must decline to answer that also, for the same reasons.

Q. You identified those papers by reference to paper handed you at the last hearing, did you not?

A. As the ones asked for?

Q. Yes.

A. I did.

Q. That is, as being those asked for by Exhibit B, attached to the record (showing witness Exhibit B)?

A. That seems to be a copy of it.

Q. Mr. Hale, I advise you that this is a proceeding under the so-called Sherman act, being an act to protect trade and commerce against unlawful restraints and monopolies, 26 Statutes, 209, 1 Supplement Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and chapter 755 of the Laws of 1903, approved February 25, 1903, and I also advise you that under the last named act no person shall be prosecuted or be subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, in any proceeding, suit or prosecution under the said act. That is referring to the Sherman act, under which this prosecution is brought. Provided, however, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose not to proceed to prosecute you or subject you to

38 any penalty or forfeiture on account of anything that you are now asked to testify to, or produce evidence documentary or otherwise regarding it, in this proceeding, and that I offer you and assure you immunity and exemption for any such testimony that you may give. Do you still decline to answer the questions which have been put to you as above?

A. I must respectfully decline.

Q. And for the same reasons that you have stated?

A. For the reasons stated.

Q. You decline to answer each of those questions upon the grounds stated in relation to such questions?

A. I do.

Q. Do you also decline still to produce the documents, papers, memoranda, correspondence, reports, accounts, etc., mentioned in the *subpoena duces tecum*, Exhibit B, in this proceeding?

A. I must respectfully decline.

Q. And for the ground you have stated in relation to the same questions heretofore?

A. I do.

Q. Mr. Hale, will you be accessible at such time as the grand jury may wish your attendance?

A. I think so.

Q. Within the next week or so?

A. Oh, yes.

Q. Then we may wish your attendance on Monday?

A. If I am notified I will attend. I just wish to state that I have declined to answer the questions, with the utmost respect for this grand jury and for the judgment of the court.

Hearing adjourned to Monday, May 8th, 1905, at 10.30 a. m.

(Endorsed :) U. S. circuit court southern district New York. Filed May 13-1905.—John A. Shields, clerk.

41 (Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Writ of *habeas corpus* and petition.—Nicoll, Anable & Lindsay, attorneys for the petitioner, 31 Nassau street, New York.—To William Henkel, United States marshal, southern district of New York.—Defendant discharged on bail to appear May 24, 1905, at 10:30 o'clock a. m., May 15, 1905, John A. Shields, U. S. commissioner.—The defendant's bail continued. Dated May 24, 1905, E. H. Lacombe, U. S. C. J.—U. S. circuit court, southern district of New York, Filed May 24, 1905, John A. Shields, clerk.

42 U. S. Circuit Court, Southern District of New York.

In the Matter of the Application of EDWIN F. HALE for a Writ of *Habeas Corpus*. Bail Bond.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

Be it remembered, that on the 15th day of May, 1905, before me, John A. Shields, United States commissioner for the southern district of New York, personally came Edwin F. Hale, as principal, and the United States Fidelity & Guaranty Co., as surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Edwin F. Hale, the sum of one thousand dollars, and the said The United States Fidelity & Guaranty Co. the sum of one thousand dollars, separately, to be levied and made on their respective goods, chattels, lands and tenements, if default shall be made in the condition following, to wit :

Whereas, the said Edwin F. Hale was detained in the custody of William Henkel as United States marshal for the southern district of New York under an order of commitment of this court dated May 11th, 1905 ; and

Whereas, the said Edwin F. Hale on the 12th day of May, 1905, made an application to the United States circuit court before
43 Honorable William J. Wallace for a writ of *habeas corpus* directed to said United States marshal, to inquire into the cause of said petitioner's detention ; and

Whereas, on the 13th day of May, 1905, this court granted said writ and made an order admitting said petitioner to bail pending the proceedings thereon ;

Now, therefore, the condition of this obligation is such that if the said Edwin F. Hale shall duly and personally appear in the United States circuit court for the southern district of New York on the 24th day of May, 1905, and from time to time hereafter, as said court may direct, and obey and abide the orders of said court, and not de-

part without leave, upon the conditions aforesaid, then this recognizance to be void, otherwise to remain in full force and virtue.

E. F. HALE, Principal.
THE UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By ALONZO G. OAKLEY, Att'y in Fact,
Surety.

Attest:

GILMAN ASHBURNER,
Att'y in Fact.

Taken and acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
U. S. Commissioner.

44 Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK, }
County of New York, } ss:

Before me personally came Alonzo G. Oakley, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company the corporation described in and which executed the annexed bond of Edwin F. Hale, as surety thereon who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the attorney in fact of the said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Edwin F. Hale is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that he is acquainted with Gilman Ashburner and knows him to be attorney in fact of said company; and that the signature of said Gilman Ashburner subscribed to said bond is the genuine handwriting of said Gilman Ashburner and was thereto subscribed by order and authority of said board of directors,

45 and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000).

ALONZO G. OAKLEY.

Sworn to, acknowledged before me and subscribed in my presence this 15th day of May, 1905.

JOHN A. SHIELDS,
U. S. Commissioner.

Endorsed: U. S. circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Bail bond.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—The within bond approved as to form and sufficiency. May 15th, 1905. John A. Shields, U. S. commissioner.—U. S. circuit court, southern district of New York, Filed May 15, 1905, John A. Shields, clerk.

46 United States Circuit Court, Southern District of New York.

In re HALE.

WALLACE, Circuit Judge:

This is a proceeding in *habeas corpus* to test the legality of the imprisonment of the petitioner pursuant to an order of the circuit court adjudging him guilty of contempt in refusing to produce certain documents and writings, and answer certain questions, as a witness before the grand jury empaneled in that court. The petitioner was the secretary and treasurer, and also a director, of MacAndrews & Forbes Company, a New Jersey corporation, and had been served with a *subpoena duces tecum* issued out of that court commanding him to testify and give evidence before the grand jury upon the part of the United States of America "in a certain action now pending and undetermined" in that court between the United States of America and the American Tobacco Company and the MacAndrews & Forbes Company, and to bring with him and produce numerous agreements, letters, telegrams, reports, and other writings, all of which were described generically, and may for present purposes be described as including all the correspondence and documents of his corporation originating since the date of its organization to which nineteen other named corporations or persons were parties. He appeared before the grand jury pursuant to the subpoena, and was then asked several questions bearing upon the general inquiry whether there was any agreement, arrangement, or understanding between his corporation and the American Tobacco Company in relation to the trade in licorice affecting the business
47 between several States of the United States. He declined to produce the papers, or to answer the questions, stating to the grand jury as a reason for so doing that he had been advised by counsel that he was under no legal obligation to produce the writing, and that the production of the papers or the answers to the questions would tend to criminate him. Thereupon he was informed by the United States attorney that the proceeding was one under the

act of Congress to protect trade and commerce against unlawful restraints and monopolies, and it was not proposed to prosecute him or subject him to any penalty or forfeiture on account of anything to which he should testify, or as to which he should produce documentary or other evidence, and that he the district attorney offered and assured to him immunity and exemption from any such testimony. The petitioner again declined to answer, for the reasons previously stated. Subsequently the grand jury made a presentment to the court charging the petitioner with contempt because of his refusal to produce the writings and give the testimony required, and setting forth fully the facts relating thereto. When this presentment was submitted to the court, the petitioner being present, the court made an order directing him to answer the questions as propounded by the grand jury, and to forthwith produce the papers. Upon his refusal to comply further proceedings were taken which resulted in an order by the court adjudging him in contempt and committing him to the custody of the marshal until he should comply with its previous order.

It is insisted by the petitioner that his imprisonment and restraint are without lawful authority for reasons which may be summarized as follows: (1) That the grand jury could only investigate specific charges against particular persons, and as there was not any proceeding of that nature before them, and no cause or action of any

48 kind whatever pending in the court, they were not in the exercise of proper authority in prosecuting the investigation when petitioner was before them, and consequently he could not be lawfully required to testify or give evidence; (2) that the petitioner was within the protection of the fifth amendment of the Constitution in refusing to testify or produce incriminating evidence against himself; and (3) that the order of the court directing him to produce the papers contravened the fourth amendment of the Constitution, and in effect deprived him of his right to be secure against an unreasonable search and seizure of his papers, and was equivalent to a warrant not issued upon probable cause or particularly describing the things to be seized.

It is manifest from the facts recited in the presentment made by the grand jury that the investigation which they were pursuing was not based upon any specific charge which had been formulated and laid before them by the United States attorney, and that it was not founded upon their own knowledge, or upon information derived from any source that a specific offence had been committed by either of the two corporations named in the subpoena. It appears to have been one which they were pursuing with the assistance of the United States attorney directed to the discovery of some infraction by one or both of these corporations of the law of Congress of July 2, 1890, "to protect trade and commerce against unlawful restraint and monopolies," known as the anti-trust law. Consequently the first contention for the petitioner presents the question whether it is within

the competency of a grand jury to institute and pursue such an investigation in the exercise of its inquisitorial power.

The authority and functions of a grand jury in the courts of the United States in investigating criminal offences are not prescribed by statute, but are such as inhere in
49 that body by the general sanction of the common law courts.

That a grand jury is not confined to the investigation of an alleged offence to which their attention has been called by the court, or which has been laid before them in an indictment or an information by the prosecuting officer of the court, or which is within the personal knowledge of some of the members, is the generally accepted opinion of the courts of this country, unless in some of the States where there may be statutory restrictions to the contrary. As said by Mr. Justice Brewer in *Frisbie vs. United States* (157 U. S., 160): "In this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected to trial, to direct the preparation of the formal charge or indictment." That they may investigate into offenses which may come to their knowledge, other than those to which their attention has been called by the court, or which have been submitted to their consideration by the district attorney, is shown by the observations of Mr. Justice Field in a carefully considered charge to a grand jury in the United States circuit court for the district of California (2 Sawy., 667). That a grand jury has certain inquisitorial powers, and by this is meant the power of instituting an investigation to discover whether a particular crime has been committed, is also a proposition which has been frequently affirmed by the courts of this country; but as to the extent and limitation of this power there is a pronounced divergency of judicial opinion. It will suffice to refer to a few of the many citations which counsel have with great industry collated.

In *Blaney vs. State of Maryland* (74 Md., 153), the court said:

50 "However restricted the functions of grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and may lawfully press, and upon their own motion originate charges against offenders, though no preliminary proceeding has been had before a magistrate, and though neither the court nor the State's attorney has laid the matter before them.
* * * Though far reaching and seemingly arbitrary, this power is at all times subordinate to the law, and experience has taught that it is one of the best means to preserve the good order of the Commonwealth, and to bring the guilty to punishment."

In *re Lester* (77 Ga., 143) the supreme court, after stating in its opinion that it was undeniable that the powers of the grand jury are to a certain extent inquisitorial but are to be exercised within well defined limits, said: "Anything they can find out upon inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to

disclose to them who have violated the public laws, and the names of persons by whom such infractions can be established ; in short, to make any man the spy upon the conduct of his neighbors and associates, and compel him to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer." Such an exercise of power, the court said, would be in derogation of " rights regarded as sacred and paramount in the intercourse between man and man ; and these rights have been carefully guarded not only by the spirit of our law, but by its express enactment."

In the United States circuit court for the district of Tennessee (reported in Wharton on Criminal Pleading, p. 224) Mr. Justice Catron compelled witnesses to answer who had been summoned by the grand jury, when it did not appear that there was any specific charge made against any particular person, and when the questions

51 were whether the witnesses knew of any person or persons in the city of Nashville who had begun, or set on foot, or provided means for, a military expedition to the island of Cuba. He said, "As all these questions tend fairly and directly to establish some of the offenses made indictable by the act of 1818, and are pertinent to the charge delivered to the grand jury they may be properly propounded, unless the answers would tend to establish that the witness was himself guilty."

In the United States *vs.* Kilpatrick (16 F. R., 765), the court after approving the practice of the State courts in North Carolina, said that grand juries "cannot make inquisitions into the general conduct of private business of their fellow-citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors." He adds : "The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition."

In Thompson & Merriam on Juries, section 615, it is said, referring to authorities cited : "These expressions of opinion bristle with evidence of the inquisitorial power of the grand jury to inquire of their own motion into offences of every character punishable by the court, of which it is a component part."

The subject is summed up in vol. 17 Am. & Eng. Enc. of Law (2nd ed.), p. 1279, as follows : "Although it has been sometimes asserted that at common law a grand jury was charged especially with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offences, according to the weight of authority the power of the grand jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body is ordinarily limited to cases in which individuals have been charged with specific

52 crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record who may, if he swear falsely, be indicted for perjury, or to cases which are called to its attention by the court or the prosecuting attorney ; and it has no

power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender." The result of the authorities seems to be fairly summarized in the last citation.

The question whether an improper exercise of the inquisitorial power subverts the jurisdiction of the court, or is merely such an irregularity as to enable the accused or a witness to invoke the intervention of the court, or as may vitiate an indictment, has never been decided. Were it not for the implication arising from the treatment of the subject in *Counselman vs. Hitchcock* (142 U. S., 547), it would seem quite clear that it could not affect the jurisdiction of the court. The grand jury is a part of the court in the exercise of criminal jurisdiction, and their proceedings are always subject to the control of the court. The court can at any time direct the grand jury to consider a particular accusation or to investigate a supposed violation of the criminal law, and whether it does this by direct instructions, or by directing the prosecuting officer to present the matter for the consideration of the grand jury, is of no consequence. If in the absence of such instructions the grand jury proceeds of its own motion, and is guilty of any abuse of its powers, the court can at any time intervene and correct or suppress the proceedings. If the conduct of the grand jury is called to its attention, and the court approves or disapproves, whether its judgment may be correct or wrong, it is in the exercise of its undoubted jurisdiction; and though it is erroneous it is not void or illegal and cannot be reviewed by *habeas corpus*. Of course this is not true in cases where the court transcends its authority.

53 In the *Counselman* case, which was a *habeas corpus* case, the court adverted to the contention that the jury in the particular case had not been "investigating specific charges against particular persons," but said that it was not necessary to intimate any opinion as to the validity of the contention, and placed its decision upon another ground. The circumstance that the point was adverted to is hardly enough to suggest that the court considered it to be a valid one.

In the present case it does not appear that the investigation was initiated *sua sponte* by the grand jury, and it may be inferred from the participation of the United States attorney in the proceeding that it originated in his informal presentation of the charge to them. The *subpoena duces tecum* was the process of the court. As it commanded the witnesses to appear before the grand jury, it is manifest that the recital about the pending "action" could only have referred to a proceeding between the United States and the two corporations of the only kind which a grand jury can entertain, viz: a preliminary investigation to ascertain whether there was sufficient cause for an indictment. When, after the presentment of the alleged contumacy of the witness by the grand jury to the court, he was ordered by the court to answer questions and produce the doc-

uments, the action of the court was equivalent to an express instruction to the grand jury to investigate the proceeding mentioned in the presentment. While the investigation was not directed to a specific offence, it was directed to the inquiry whether one of the laws of the United States, the so-called anti-trust law, had been violated by either or both of the two corporations mentioned. Without this intervention by the court the investigation would have been

one upon the border line between the legitimate exercise and
 54 the abuse of the inquisitorial power of the grand jury; but not one which can be safely held to have been an ultra judicial proceeding. After the intervention of the court the original abuse of power, if there was any, became innocuous.

The contention for the petitioner that the order of the court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case would be clearly sound were it not for the effect of the immunity act of Congress of February 25, 1903. In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offences of the corporation, and was therefore criminally responsible himself. It is not for this court to question the soundness of the judgment in *Brown vs. Walker* (161 U. S., 591), or to weigh the value of the dissenting opinions. That judgment is authoritative that such an exemption from liability to prosecution or penalty as was secured to the witness by the immunity act of February 25, 1903, if it extends to testimony given or compelled before a grand jury, defeats the application of the fifth amendment to the Constitution so that the prohibition against compelling a person to be a witness against himself in a criminal case does not protect him. The petitioner's counsel do not argue otherwise, and their argument is that the immunity given by this act does not extend to testimony given by a witness before a grand jury. The provision is that no person shall be prosecuted or subjected to any penalty for or on account of any action, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, "in any proceeding, suit or prosecution" under the several statutes mentioned including the anti-trust act. The argument that a proceeding

before a grand jury is not such a proceeding as is meant
 55 by the provision has been ingeniously presented, and is not without plausibility. But the word "proceeding" is a broad term, and was apparently intended to include some form of judicial inquiry other than a "suit or prosecution." In one sense it is true a criminal proceeding is not instituted against the accused person until a formal charge is made against him by indictment or information, or a complaint before a magistrate, and proceedings before a grand jury are not in that sense a criminal proceeding against the accused. *Post vs. United States* (161 U. S., 583). But in another sense any initial step before a judicial tribunal preliminary to the commencement of a civil suit or a criminal prosecution is a pro-

ceeding. As used in this statute, inasmuch as testimony given in a suit or prosecution embraces that given not only at the trial but upon all occasions incident to the controversy, the term "proceeding" if limited to some step in the progress of a civil suit or a criminal prosecution which has been previously instituted, is mere tautology. A rational construction seems to require it to include any preliminary step which is incident to the institution of a civil suit or a criminal prosecution.

The contention that the order requiring the petitioner to produce the papers called for by the *subpœna duces tecum* was made in violation of the petitioner's rights under the fifth amendment to the Constitution raises the question whether such a general inquisition into his private papers as is permitted by the terms of the *subpœna* was not such an abuse of judicial process as to amount to an unreasonable search and seizure. As Judge Cooley says in his work on Constitutional Limitations: "Near in importance to exemptions from an arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the Government, and protection in person, property and papers, against even the process of the law, except in a few specified cases."

In *Boyd vs. United States* (116 U. S., 616) it was decided that a law of Congress, which authorized a court of the United States in revenue cases on motion of the Government attorney to require a defendant to produce in court his private books, invoices, and papers, and permit the attorney under the direction of the court to make examination of the same, and which provided that if the defendant should refuse to produce the same the allegations of the attorney as to their contents specified in his written motion should be taken as confessed, was unconstitutional and void, as being repugnant to the fourth and fifth amendments to the Constitution. The court said: "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the Constitution, in all cases in which a search or seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure." And the court concluded: "We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings." It will be observed that the statute in that case did not deprive the party of the custody of the books and papers which he was required to produce, and authorized only such an inspection of them as the court might direct. This judgment concludes an inquiry by this court as to the validity of two propositions, and it settles first, that a *subpœna* or an order of the court may be the equivalent of a

57 search and seizure within the constitutional provision; and, second, that any search or seizure for the purpose of obtaining incriminating evidence against the party is an unreasonable one within the meaning of the provision. That judgment would have controlled this case, and would have entitled the petitioner to be discharged, if the evidence sought to be procured could have been used to incriminate the petitioner. Is a search and seizure any the less unreasonable when it compels the official custodian of all the papers of his principal, whose duty it is to keep their privacy inviolable, to produce them in order to incriminate his principal? It may be conceded that his duty to the State and courts is paramount; but is this true when the evidence is not to be used against a principal who is under any criminal accusation, or against whom any civil suit is pending, and is only to be used to discover if possibly any ground of accusation can be found against him?

If the petitioner had been ordered to produce a single document, or numerous documents in his possession, which were adequately described to enable him to find them, for use as evidence in a pending action, civil or criminal, it seems plain that the order would have been unobjectionable, and such as the courts are daily making. Such was the case in *Interstate Commerce Commission vs. Baird* (194 U. S., 25), where the observation was made by the court upon which the Government relies.

The petitioner was required to produce a numerous array of documents and papers for the purpose of ascertaining whether they contained anything which would tend to establish the commission of an offence by either of the two corporations; and it is apparent that the object was to enable the Government, by inspecting this mass of the private papers and documents of the petitioner's corporation, to find something which might induce the grand jury to find an indictment against his corporation. It is this which gives to
58 the proceeding its color of oppression and the attributes of an unreasonable search and seizure.

The legality of search warrants has been sanctioned on the ground of public necessity, because without them felons and other malefactors would escape detection. But a search warrant for the papers of a suspected party, to be used as evidence against him, was illegal at the common law. *Archibold Cr. Law* (7th ed.) 141. Because of the obnoxious character of the process very great particularity is required in designating the articles to be searched for before the officers of the law are permitted to invade the premises where the articles sought are supposed to be. A designation of goods to be searched for as "goods, wares and merchandise," without more particular description, has been regarded as insufficient even in the case of goods supposed to be smuggled, where there is usually greater difficulty in giving description and consequently more latitude should be permitted, than in the case of property stolen. *Sandford vs. Nicholas* (13 Mass., 286). Lord Camden, speaking of a warrant not specifying the particular papers but authorizing the

seizure of all the papers of the person named in it, described it as "an execution upon all the party's papers," and said: "To enter a man's house by virtue of a nameless warrant, in order to produce evidence, is worse than the Spanish inquisition; a law under which no Englishman would care to live an hour." *Entineck vs. Carrington* (19 State Trials, 1029). Any process which is issued to perform the office of a search warrant should conform in some remote degree at least in certainty and specific description to the requirements of a valid search warrant. The subpoena issued in this case may possibly meet these requirements, but it is not too much to say that it resembles more nearly a general warrant to search all the private papers of a witness. It falls but little short of being in substance

59 and effect a roving commission, devised by the Government to compel a witness to bring before the grand jury a general mass of the private papers of his principal in order that the prosecuting officer might discover whether at any time during its corporate life the principal had been a party to any act which could afford the basis of a criminal accusation. This was a wanton assault upon the right of privacy, and in my judgment the process, in view of the circumstances under which and the purpose for which it was issued, authorized an unreasonable search and seizure of papers within the spirit and meaning of the fourth amendment.

The conclusions thus indicated would ordinarily lead to an order for the petitioner's discharge; but the order compelling him to produce the papers alluded to in the subpoena was made by one of the judges of this court, and although it was not made under circumstances which afforded an opportunity for deliberate consideration, the manifest impropriety of reversing it indirectly in the same court, held by a different judge, is so great that it ought not to be done if the only result will be to shift the burden of preparing a record for a review by a higher tribunal from the one party to the other. Whether the present decision is in favor of the petitioner or against him, it is understood that it will be taken for review to the Supreme Court, and pending that review the petitioner will not be confined.

Under these circumstances an order will be entered refusing the discharge of the petitioner.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—*In re Hale*.—Opinion Wallace, C. J.—U. S. circuit court, southern district of New York, Filed Jun-8, 1905, John A. Shields, clerk.

60 At a stated term of the circuit court of the United States of America in and for the southern district of New York in the second circuit, held at the United States court and post office building in the borough of Manhattan, in the city of New York on the 10th day of June 1905.

Present: Hon. William J. Wallace, circuit judge.

In the Matter of the Application of EDWIN F. HALE for a Writ of
Habeas Corpus.

On reading and filing the petition of the above named Edwin F. Hale, verified the 11th day of May, 1905, for a writ of *habeas corpus*, the writ of *habeas corpus* issued thereon on the 13th day of May 1905, directed to William Henkel, United States marshal for the southern district of New York, the return to the said writ made by the said marshal on the 24th day of May 1905, and the petitioner's exception to the sufficiency of the said return, and a motion for his discharge, dated the said 24th day of May, 1905, and the petitioner having been duly produced before the court in obedience to the said writ of *habeas corpus*, and the same having duly come on to be heard.

Now after hearing Elihu Root, Esq., and De Lancey Nicoll, Esq., of counsel for the petitioner, in support of the application for
61 the petitioner's discharge, Henry W. Taft, Esq., ass't United States attorney for the southern district of New York, in opposition to the said application and in support of a motion to remand the petitioner to custody, and due deliberation having been had in the premises, it is,

Ordered that the said writ of *habeas corpus* be and the same is hereby dismissed and discharged, and that the petitioner be and he is hereby remanded to the custody of the marshal.

Enter.

WILLIAM J. WALLACE,
United States Circuit Judge.

Approved as to form.

FELIX H. LEVY,
Ass't U. S. Attorney.

(Endorsed :) Circuit court of the U. S., southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Order discharging writ.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, N. Y. city.—U. S. circuit court, southern district of New York, Filed Jun- 18, 1905, John A. Shields, clerk.

62 Supreme Court of the United States.

In the Matter of the Application of EDWIN F. HALE for Writ of
Habeas Corpus.

EDWIN F. HALE, Appellant,

vs.

WILLIAM HENKEL, Marshal in and for the Southern District of
New York, Appellee.

Know all men by these presents that we, Edwin F. Hale, as principal, and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America, in the full and just sum of one thousand dollars (\$1000) to be paid to the United States, to which payment well and truly, to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this thirteenth day of June, 1905.

Whereas, lately, to wit, on the 10th day of June, 1905, at a circuit court of the United States in and for the southern district of
63 New York, in a proceeding therein pending an order was entered dismissing a certain writ of *habeas corpus* theretofore allowed upon the application of the above named petitioner and remanding the petitioner to the custody of the above named appellee; and

Whereas, the said petitioner has duly obtained an appeal from the said order to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the said circuit court to review the same, and

Whereas, the said court, good cause therefor being shown, has by order this day duly made and entered directed that the petitioner may be enlarged upon recognizance, with sufficient surety, in the sum of one thousand dollars (\$1000) for his appearance to answer the judgment of the said Supreme Court;

Now, the condition of this recognizance is such, that if the said petitioner Edwin F. Hale, shall appear to answer the judgment of the Supreme Court upon the said appeal, then this recognizance shall be void, else to remain in full force and effect.

EDWIN F. HALE.

[SEAL.]

THE UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By ALONZO G. OAKLEY, Attorney in Fact.

Attest:

[SEAL.]

GILMAN ASHBURNER, Attorney in Fact.

Taken and acknowledged before me this 13th day of June, 1905.

JOHN A. SHIELDS,
U. S. Commissioner.

64 Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK, }
County of New York, } ss.:

Before me personally came Alonzo G. Oakley, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company the corporation described in and which executed the annexed bond of Edwin F. Hale, as surety thereon who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the attorney in fact of the said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Edwin F. Hale is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that he is acquainted with Gilman Ashburner and knows him to be attorney in fact of said company; and that the signature of said Gilman Ashburner subscribed to said bond is the genuine handwriting of said Gilman Ashburner and was thereto

subscribed by order and authority of said board of directors,
65 and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000).

ALONZO G. OAKLEY.

Sworn to, acknowledged before me and subscribed in my presence this 13th day of June, 1905.

JOHN A. SHIELDS,
U. S. Commissioner.

(Endorsed :) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant, of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York. Filed Jun- 13, 1905. John A. Shields, clerk.

66 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of EDWIN F. HALE for a Writ of *Habeas Corpus*.

EDWIN F. HALE, Appellant,	}
<i>vs.</i>	
WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.	

SIRS: Please take notice that Edwin F. Hale, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the 10th day of June, 1905, discharging the writ of *habeas corpus* herein, and from each and every part of the said order.

Dated at the city of New York the 13th day of June, 1905.

Yours &c., NICOLL, ANABLE & LINDSAY,
Attorneys for the Petitioner.

Office & post office address, 31 Nassau street, borough of Manhattan, New York city.

67 To Hon. Henry L. Burnett, United States attorney in and for the southern district of New York. William Henkel, United States marshal, southern district of New York. John A. Shields, Esq., clerk of the circuit court of the United States in and for the southern district of New York.

Endorsed: United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*.—Notice of appeal.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York. U. S. circuit court, southern district of New York, Filed Jun-13, 1905, John A. Shields, clerk.

68 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of EDWIN F. HALE for a Writ of *Habeas Corpus*.

EDWIN F. HALE, Appellant,	}
<i>against</i>	
WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.	

Edwin F. Hale, the petitioner and appellant above named, feeling himself aggrieved by the final order heretofore made and entered

in this court in this cause on the — day of June, 1905, whereby it was decided and ordered (among other things) that the writ of *habeas corpus* issued herein on the 13th day of May, 1905, be discharged, now comes Nicoll, Anable & Lindsay, his solicitors and counsel, and petitions this court for an order allowing him to prosecute an appeal from the said final order to the Supreme Court of the United States under and according to laws of the United States in that behalf made. Your petitioner is advised by counsel that there are grave doubts concerning the legality, under the Constitution and laws of the United States, of his imprisonment and detention under the commitment of this court mentioned in his petition for the said writ and the validity and regularity of the proceedings referred to in the said petition and that he desires in good faith to submit these questions to the Supreme Court for their determination. And your petitioner will ever pray.

NICOLL, ANABLE & LINDSAY,
Solicitors and Counsel for the Petitioner.

31 Nassau street, borough of Manhattan, New York city.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

Edwin F. Hale, being duly sworn says: That he is the petitioner above named and that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

EDWIN F. HALE.

Sworn to before me this 15th day of June, 1905.

JOHN A. SHIELDS,
U. S. Commissioner.

70 The foregoing petition for appeal is granted and the claim of the appellant therein made is allowed. Supersedeas bond fixed at two hundred and fifty dollars (\$250). And good cause therefor being shown, pending the said appeal the petitioner may be enlarged upon recognizance, with sufficient surety in the sum of one thousand dollars (\$1000.) for his appearance to answer the judgment of the Supreme Court.

Done in open court this 13th day of June, 1905.

E. HENRY LACOMBE,
United States Circuit Judge.

Endorsed: United States circuit court, southern district of New York.—In the Matter of the application of Edwin F. Hale for writ of *habeas corpus*.—Edwin F. Hale, appellant, v. William Henkel, marshal in and for the southern district of New York, appellee.—

Petition for appeal and allowance thereof.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau St., N. Y. city.—Due service of the within petition & allowance of appeal is hereby admitted this 13th day of June, 1906.—Felix V. Levy, ass't U. S. att'y. Wm. Henkel, U. S. marshal.—United States circuit court, southern district of New York. Filed Jun- 13, 1905, John A. Shields, clerk.

71 In the Supreme Court of the United States.

In the Matter of the Application of EDWIN F. HALE for Writ of *Habeas Corpus*.

EDWIN F. HALE, Appellant,

vs.

WILLIAM HENKEL, Marshal in and for the Southern District of
New York, Appellee.

Now comes the petitioner, Edwin F. Hale, by Nicoll, Anable & Lindsay, his attorneys, in connection with his petition of appeal to the Supreme Court from the order of the circuit court of the United States in and for the southern district of New York, entered herein on the — day of June, 1905, discharging the writ of *habeas corpus* allowed herein on the 13th day of May, 1905, and makes and files the following assignment of errors:

The court erred:

1. In dismissing the said writ of *habeas corpus*.

2. In holding that the petitioner was lawfully held in custody under the commitment of the circuit court dated the 11th day of May, 1905, and referred to in the said petition.

72 3. In holding that the circuit court had jurisdiction under the Constitution and laws of the United States by reason of any of the matters or things contained and set forth in the presentments or reports of the grand jury referred to in said petition, or either of them, to entertain any charges or charges of contempt against the petitioner, or to act or proceed in any manner in the premises.

4. In holding that at the time the petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was any cause of action of any kind whatever depending in the circuit court between the United States and the corporations named in the *subpoena duces tecum*, a copy of which is annexed to the petition, in which the petitioner could lawfully be required under the said Constitution and laws to testify or give evidence before the grand jury.

5. In holding that the grand jury was in the exercise of its proper and legitimate authority in prosecuting the alleged investigation set out in the said reports or presentments.

6. In holding that section 1 of the legislative executive and judi-

cial appropriation act approved February 25, 1903, gave the petitioner immunity from prosecution for or on account of transactions, matters or things concerning which he was directed to testify and produce evidence before the grand jury.

73 7. In holding that the investigation before the grand jury in which the petitioner was required to testify and produce papers and documents under the circumstances set forth in the petition was a proceeding, suit or prosecution under the so-called Sherman act, being "An act to protect trade and commerce against unlawful restraint and monopolies" (26 Stat. 209) and the acts amendatory thereof and supplemental thereto and particularly the said act of February 25, 1903.

8. In holding that the petitioner was not privileged under the Constitution and laws of the United States and particularly by the fifth amendment to the Constitution, to refuse to testify or produce evidence before the said jury upon the said investigation when by so doing he might incriminate himself.

9. In holding that the said act of February 25, 1903, does not usurp and infringe upon the pardoning power exclusively vested in the President of the United States by the express terms of section 2 of article II of the Constitution of the United States.

10. In holding that the said act of February 25, 1903, does not infringe upon and set at naught the express provisions of article X of the amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, respectively, or to the people.

74 11. In holding that the said act of February 25, 1903, does not deprive the various States of the United States of the sovereign right and power reserved to them by the said article X to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, provided such persons testify or produce evidence documentary or otherwise, concerning such transactions, matters and things in proceedings, suits or prosecutions under the three acts mentioned in the said act of February 25, 1903.

12. In holding that the said act of February 25, 1903, does not impair the right of the various States of the United States under article X, aforesaid, to prosecute and punish offenders against their own peace and dignity.

13. In holding that the said act of February 25, 1903, by undertaking in effect to grant pardons to persons who have been concerned in transactions, matters or things violative of the laws of the various States, provided such persons testify and produce evidence documentary or otherwise, concerning such transactions matters or things in proceedings, suits or prosecutions under the statute therein mentioned, does not usurp the power expressly reserved to the States by article X, aforesaid, to grant or withhold pardons and to provide for

and deal with the granting or withholding or granting therein in accordance with their own constitution and laws.

14. In holding that the said act of February 25, 1903, requires a person to testify or produce evidence in proceedings, suits or prosecutions under the three acts therein mentioned, notwithstanding such testimony or production may tend to criminate him.

75 15. In discharging the said writ notwithstanding the order of the circuit court of May 5, directing the petitioner forthwith to produce the papers called for by the *subpoena duces tecum* under the circumstances set forth in the said petition was made in violation of the petitioner's rights under the fourth amendment of the Constitution of the United States, providing that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be *be* violated.

16. In discharging the said writ notwithstanding the said order of May 5th was, in effect, a warrant to search for and seize the papers mentioned in the *subpoena duces tecum*, and was issued in violation of the said fourth amendment.

17. In discharging the said writ notwithstanding the issuance of the said *subpoena duces tecum*.

18. In holding, the papers mentioned in the said subpoena being the property of the McAndrews & Forbes Company and in the petitioner's custody solely, by reason of his official relations toward that company, that the compulsion of the said subpoena and of the order that he produces such papers thereunder would not, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation in violation of its rights under the said fourth amendment.

76 19. In holding that by refusing to comply with the requirements of the said subpoena and of the order of the circuit court that he produce the said papers thereunder, the petitioner was not protecting by lawful means the company's right under the said fourth amendment to be secure in its papers and effects against unreasonable searches and seizures.

20. In holding that the petitioner was under a legal obligation to enforce and obey the said order of May 5th.

21. In holding that it was not the petitioner's duty as an officer and director of the said corporation to disobey the said subpoena and order.

22. In holding that the order of the circuit court of May 8th, 1905, adjudging the petitioner guilty of contempt and the commitment issued pursuant to the said order were not without legal right, authority or jurisdiction of any kind and were not utterly void and ineffectual and that the petitioner's detention and imprisonment thereunder was not in violation of the Constitution of the United States, and in violation of his rights, privileges and immunities thereunder.

By reason whereof the petitioner prays that the said order discharging the writ of *habeas corpus* herein and remanding the peti-

- 77 tioner to the custody of the appellee be reversed and that he be dismissed and released from all further restraint in the premises.

EDWIN F. HALE, Petitioner.

NICOLL, ANABLE & LINDSAY,
Counsel for Petitioner.

Read the 13th day of June, 1905.

E. HENRY LACOMBE,
United States Circuit Judge.

Endorsed: United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for writ of *habeas corpus*.—Edwin F. Hale, appellant, vs. William Henkel, marshal in and for the southern district of New York.—Assignment of errors.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau St., New York.—U. S. circuit court, southern district of New York. Filed June 13, 1905. John A. Shields, clerk.

- 78 Supreme Court of the United States.

In the Matter of the Application of EDWIN F. HALE for Writ of
Habeas Corpus.

EDWIN F. HALE, Appellant,
vs.

WILLIAM HENKEL, Marshal in and for the Southern District of
New York, Appellee. }

Know all men by these presents that we, Edwin F. Hale, as principal and the United States Fidelity & Casualty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars (\$250) to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of June, 1905.

- Whereas, lately, to wit, on the 10th day of June, 1905, at the circuit court of the United States in and for the southern district
79 of New York, in a proceeding therein pending, an order as entered dismissing and discharging a certain writ of *habeas corpus* theretofore allowed upon the application of the above named petitioner and remanding him to the custody of the appellee; and

Whereas, the said petitioner has duly obtained an appeal from

the said order to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the said circuit court to review the same,

Now the condition of the above obligation is such, that if the said petitioner, Edwin F. Hale, shall prosecute said appeal to effect and shall answer all costs therefor, or failing to make the said appeal good, then the above obligation to be void, else to remain in full force and effect.

EDWIN F. HALE. [SEAL.]
THE UNITED STATES FIDELITY AND
GUARANTY CO.,
By ALONZO G. OAKLEY, Attorney in Fact.

Attest:
[SEAL.] GILMAN ASHBURNER,
Attorney in Fact.

Taken and acknowledged before me this 13th day of June, 1905.

JOHN A. SHIELDS.
U. S. Commissioner.

80 Affidavit, Acknowledgment, and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK, }
County of New York, } ss:

Before me personally came Alonzo G. Oakley, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company the corporation described in and which executed the annexed bond of Edwin F. Hale, as surety thereon who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the attorney in fact of the said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Edwin F. Hale is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that he is acquainted with Gilman Ashburner and knows him to be — attorney in fact of said company; and that the signature of said Gilman Ashburner subscribed to said bond is the genuine handwriting of said Gilman Ashburner

81 and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000).

ALONZO G. OAKLEY.

Sworn to, acknowledged before me and subscribed in my presence this 13th day of June, 1905.

JOHN A. SHIELDS,
U. S. Commissioner.

(Endorsed :) Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant, of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York, Filed Jun-13, 1905. John A. Shields, clerk.

82 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States, in the second circuit, to Honorable Henry L. Burnett, United States attorney for the southern district of New York, and to William Henkel, United States marshal in and for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the capital in the city of Washington in the District of Columbia on the 11th day of July, 1905, pursuant to a petition, allowance and notice of appeal filed in the clerk's office in the circuit court of the United States for the southern district of New York, wherein one Edwin F. Hale is the appellant and you, the said marshal are appellee, to show cause, if any there be, why the final order of the said circuit court in the said petition, allowance and notice of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above mentioned, this 13th day of June, 1905.

E. HENRY LACOMBE,
United States Circuit Judge.

NICOLL, ANABLE & LINDSAY,
Attorneys for Petitioner and Appellant.

83 Endorsed: United States circuit court, southern district of New York.—In the matter of the application of Edwin F. Hale, for writ of *habeas corpus*.—Edwin F. Hale, appellant, vs. William Henkel, marshal in and for the southern district of New

York, appellee. Citation.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, N. Y. city. Due service of the within citation papers is hereby admitted this 13th day of June, 1905. Felix H. Levy, ass't U. S. att'y. Wm. Henkel, U. S. marshal.—U. S. circuit court, southern district of New York, Filed June 15, 1905, John A. Shields, clerk.

84 UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighty-three inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled In the matter of the application of Edwin F. Hale, for a writ of *habeas corpus*. Edwin F. Hale, appellant vs. William Henkel, marshal in and for the southern district of New York, appellee as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10th day of July in the year of our Lord one thousand nine hundred and five and of the Independence of the said United States the one hundred and thirtieth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, Clerk.

[Endorsed:] United States Supreme Court. Edwin F. Hale appellant vs. William Henkel, marshal in and for the southern district of New York appellee. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 19,842. S. New York C. C. U. S. Term No. 340. Edwin F. Hale, appellant, vs. William Henkel, United States marshal in and for the southern district of New York. Filed July 13th, 1905. File No. 19,842.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 341

WILLIAM H. McALISTER, APPELLANT,

VS.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 15, 1906.

(19,843.)

(19,843.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 341.

WILLIAM H. McALISTER, APPELLANT,

vs.

WILLIAM HENKEL, UNITED STATES MARSHAL IN AND
FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Petition for writ of <i>habeas corpus</i>	1	1
Exhibit A—Commitment	9	5
B—Order for commitment.....	11	6
C—Report of grand jury, June 14, 1905.....	13	7
Exhibit A— <i>Subpoena duces tecum</i> to McAlister.....	20	10
B—Testimony of Wm. H. McAlister.....	23	11
C—Agreement between Ogden's Limited, the American Tobacco Company, <i>et al.</i> , September 27, 1902.	29	14
D—Report of grand jury (second).....	50	25
Order denying petition for writ of <i>habeas corpus</i>	59	29
Recognizance on appeal.....	61	30
Notice of appeal.....	65	32
Petition of appeal.....	67	33
Allowance of appeal.....	68	34
Assignment of errors.....	70	35
Bond for costs on appeal.....	76	38
Citation (copy).....	80	40
Clerk's certificate.....	81	41

1 To the circuit court of the United States in and for the southern district of New York, in the second judicial circuit:

The petition of William H. McAlister respectfully shows:

I. That your petitioner is a citizen of the United States, an inhabitant and citizen of the State of New York, and a resident of the city of New York, in this circuit and district.

II. That your petitioner is now, and for some time past has been a director, and the secretary of the American Tobacco Company, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

III. That your petitioner is now actually imprisoned and restrained of his liberty and detained by color of the authority of the United States, in the custody of William Henkel, Esquire, United States marshal in and for the southern district of New York, to wit, at the borough of Manhattan, of the city of New York, in the said district.

IV. That the sole claim or authority by virtue of which the said William Henkel, marshal as aforesaid, so restrains and detains your petitioner, is a certain commitment in writing, a copy of which is hereto annexed marked "A."

V. That the said commitment was issued pursuant to an order of this court made and entered at a stated term thereof held at the post office building in the city of New York on the 14th day of June, 1905, a copy of which said order is hereto annexed marked "B."

2 VI. That the said last mentioned order was made and based solely and exclusively, upon two certain presentments or reports presented to and filed in this court by the grand jury of the United States for the southern district of New York, on the 14th day June, 1905, copies of which said presentments or reports (which are referred to and described in the said last mentioned order as "charges of contempt") are hereto annexed, marked "C" and "D," respectively.

VII. That your petitioner's imprisonment, restraint and detention are without authority of law whatsoever, and in violation of his rights, privileges and immunities under the Constitution and laws of the United States, for the following reasons:

(a.) This court was without jurisdiction under the said Constitution and laws, by reason of any of the matters or things contained and set forth in the said presentments or reports of the grand jury, or either of them, to entertain any charge or charges of contempt against your petitioner, or to act or proceed in any manner in the premises.

(b.) As appears from the said presentments or reports, at the time your petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was no cause or proceeding depending

in this court or before the grand jury between the United States of America and the American Tobacco Company and the Imperial Tobacco Company, (of Great Britain and Ireland), Limited, defendants, in which your petitioner could be required under the said Constitution and laws, to testify or give evidence before the grand jury.

3 (c.) As appears from the said presentments or reports the grand jury was not in the exercise of its proper and legitimate authority in prosecuting the so-called "suit or proceeding" so described therein, the powers of a Federal grand jury being limited under the Constitution to the investigation of specific charges against particular persons, duly laid before them, and based upon definite allegations, and there being before the grand jury at the time your petitioner attended before them no bill of indictment, nor any specific charge or charges against any particular person, except that originated by the oral statement of the attorney for the Government as appears from the said reports or presentments; consequently its requirement that your petitioner should testify and produce documentary evidence, and the orders of the court based thereon, were *coram non judice* and void.

(d.) Section 1 of the legislative, executive and judicial appropriation act for the fiscal year ending June 30, 1904, approved February 25, 1903, does not give your petitioner immunity from prosecution, for or on account of transactions, matters or things concerning which he was directed to testify and produce evidence before the grand jury, the investigation herein before that body upon which he was required to testify and produce said papers and documents not being a proceeding, suit or prosecution under either of the acts referred to in the act of February 25, 1903; consequently your petitioner was privileged under the Constitution and laws of the United States, and particularly by the 5th amendment to the said Constitution, to refuse to testify or produce evidence before the grand jury upon the said investigation, when by so doing he might criminate himself, as he avers, he might have, had he given the testimony or produced the papers and documents as required by the grand jury and the court.

4 (e.) The order of the court directing your petitioner to testify and produce evidence before the grand jury was, in effect, an attempt to compel the American Tobacco Company to be a witness against itself in a criminal case in violation of the said 5th amendment, the so-called "suit or proceeding" before the grand jury being directed against that company and another, and the sole motive of examining your petitioner being the fact that his evidence of matters within his knowledge solely by reason of his official relations toward that company might tend to furnish evidence against it.

(f.) The privilege of the American Tobacco Company secured to it by the said 5th amendment against being compelled to be a witness against itself in a criminal case would have been violated by the compulsory examination of your petitioner in respect to the

matters concerning which he was directed to testify and give evidence before the grand jury.

(g.) The said act of February 25, 1903, is unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things constituting violations of the laws of the United States, on condition that they will, when so required, testify and produce evidence, documentary or otherwise, concerning such violations in proceedings, suits or prosecutions under the three statutes mentioned therein, thus usurping and infringing upon the pardoning power exclusively vested in the President by the express terms of section 2, of article II of the Constitution of the United States, and which is not subject to legislative control; consequently the said act does not operate to deprive
5 your petitioner of his right under the constitutional provision above mentioned to refuse to criminate himself.

(h.) The said act of February 25, 1903, is also unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, provided such persons testify or produce evidence, documentary or otherwise, concerning such transactions, matters and things, in proceedings, suits or prosecutions under the three acts before mentioned, thus infringing upon and setting at naught the express provisions of article X of the amendments to the Constitution of the United States that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, of which the right to prosecute and punish offenders against their own peace and dignity is one, are reserved to the States, respectively, or to the people.

(i.) The said act of February 25, 1903, is further unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in transactions, matters or things, notwithstanding such transactions, matters or things may constitute violations of the laws of the various States, provided such persons testify and produce evidence, documentary or otherwise, concerning such transactions, matters or things in proceedings, suits or prosecutions under the statutes therein mentioned, thus usurping the power expressly reserved to the States by article X of the amendments to the Constitution of the United States to grant or withhold pardons, and to provide for and deal with the granting or withholding thereof, in accordance with their own constitutions and laws.

6 (j.) The said act of February 25, 1903, contains no requirement that a person shall testify or produce evidence in proceedings, suits or prosecutions under the three acts notwithstanding such testimony or production may tend to criminate him; therefore its only effect is to render testimony incompetent as evidence when the person giving it has voluntarily waived his constitutional privilege, whereas before the passage of the act such testimony could have been used against the person giving it.

(k.) The court's order directing your petitioner forthwith to produce the papers called for by the *subpoena duces tecum* was made in violation of your petitioner's rights under the fourth amendment to the Constitution of the United States providing that the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated.

(l.) The papers mentioned in the said *subpoena duces tecum* being the property of the American Tobacco Company and in your petitioner's custody solely by reason of his official relations toward that company, the compulsion of said subpoena, and of the order that he produce such papers thereunder would, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation, in violation of its rights under the said fourth amendment, which it was in your petitioner's duty as such officer and custodian to protect by lawful means, as he is now doing.

(m.) The production of the said papers described in the *subpoena duces tecum* being required of your petitioner in his capacity of officer and director of the said corporation, and the said subpoena not being issued upon probable cause, or supported by oath or affirmation, its issuance constituted a violation of the said fourth amendment; consequently, not only was your petitioner under no legal obligation to obey the same, but his duty as such officer and director required him to disobey it.

VIII. Your petitioner is advised by counsel and verily believes that for the reasons above stated the order adjudging him guilty of contempt and his commitment pursuant to said order to the custody of the marshal were without legal right, authority or jurisdiction of any kind, and are utterly void and ineffectual, and that his detention and imprisonment thereunder are in violation of the Constitution of the United States and in violation of his rights, privileges and immunities thereunder.

Wherefore your petitioner prays that a writ of *habeas corpus* may issue directed to the said William Henkel, Esquire, marshal, as aforesaid, or to any of his deputies, requiring him or them to bring and have your petitioner before this court at a time to be by it determined, together with the true cause of his detention, to the end that due inquiry may be had in the premises, and that this court may proceed in a summary way to determine the facts of the case in that regard, and the legality of your petitioner's imprisonment, restraint and detention, and thereupon to dispose of your petitioner as law and justice require.

And your petitioner will ever pray.

Dated at the city of New York the 14th day of June, 1905.

WILLIAM H. McALISTER,
NICOLL, ANABLE & LINDSAY,
Attorneys for the Petitioner.

Office and post-office address, 31 Nassau street, Manhattan, New York, N. Y.

8 UNITED STATES OF AMERICA,
Southern District of New York, } ss :

William H. McAlister, being duly sworn deposes and says that he is the petitioner above named ; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WILLIAM H. McALISTER.

Sworn to before me this 14th day of June, 1905.

JOHN A. SHIELDS,
U. S. Commissioner.

9 "A."

Circuit Court of the United States, Southern District of New York.

In the Matter of WILLIAM H. McALISTER, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness William H. McAlister, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court, upon the 14th day of June, 1905, and the said witness, on that day, appearing in person in open court, and having been ordered by the court to answer the said questions and produce the said papers and documents ; and further charges of contempt having been presented by the said grand jury, on the 14th day of June, 1905, showing that, after the making of the said order by the court on June 14th, 1905, the said witness appeared before the said grand jury and again refused to answer the said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, both of which charges were filed herein on the 14th day of June, 1905 ; and the said William H. McAlister having again appeared in person, in open court on the said 14th day of June, 1905, and been heard, and an order having, thereupon, been made, in writing, by this court, on the 14th day of June, 1905, wherein it was considered, ordered and adjudged by this court that the said William H. McAlister be adjudged to have committed the contempt alleged, and that he be fined the sum of five dollars, and that he be committed to the custody of the marshal until he complies with the aforesaid order of the court, by answering the said questions and producing the said papers and documents, or be discharged by due process of law ;

This therefore is to command the United States marshal, for the southern district of New York, to take and receive the said William H. McAlister into his custody, in pursuance of the aforesaid order, and to detain him until he be legally discharged.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fourteenth day of June, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of
America for the Southern District of
New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. C. Judge.

11

"B."

At a stated term of the circuit court of the United States, held at the post office building, in the city of New York, on the 14th day of June, 1905.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of WILLIAM H. MCALISTER, a Witness Charged with Contempt by the Grand Jury, Circuit Court of the United States for the Southern District of New York.

Charges of contempt on the part of the witness William H. McAlister, for refusal to answer certain questions and produce certain papers and documents, having been presented by the grand jury to this court, upon the 14th day of June, 1905, and the said witness, on that day, appearing in person in open court, and having been ordered by the court to answer the said questions and produce the said papers and documents; and further charges of contempt having been presented by the said grand jury, on the 14th day of June, 1905, showing that, after the making of the said order of June 14th, 1905, the said witness appeared before the said grand jury and again refused to answer the said questions and produce the said papers and documents, as required by the said order, all of which is more particularly set out in the said charges of the grand jury, both of which charges were filed herein on the 14th day of June, 1905; and the said William H. McAlister having again appeared in person, in open court, on the said 14th day of June, 1905, and been heard, it is now

12

Considered, ordered and adjudged by the court that the said William H. McAlister be, and he is hereby, adjudged to have committed the contempt alleged as aforesaid; that he be, and he hereby is, fined the sum of five dollars, and that he be committed

to the custody of the marshal, until he complies with the aforesaid order of the court, by answering the said questions and producing the said papers and documents, or is discharged by due process of law.

E. HENRY LACOMBE, U. S. C. J.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—In the matter of William H. McAlister, a witness charged with contempt by the grand jury, circuit court of the United States, for the southern district of New York.—Order for commitment.—U. S. circuit court, southern district New York, Filed Jun- 14, 1905, John A. Shields, clerk.

13

"C."

NEW YORK CITY, N. Y., June 14th, 1905.

To the Hon. E. Henry Lacombe, judge of the United States circuit court for the southern district of New York.

SIR: The grand jury for the May term, 1905, respectfully represents to your honor, and charges, that William H. McAlister is guilty of contempt of court, in this, to wit: That upon the 13th day of June, 1905, a subpoena, in due form, was personally served upon the said William H. McAlister, commanding him to appear before the said grand jury, at a certain time named in the said subpoena, to-wit, on the 14th day of June, 1905 (a copy of which subpoena is hereto annexed, marked "Exhibit A"), to testify and give evidence in relation to a certain complaint or charge then under investigation before the said grand jury, and to produce, at the said time and place, certain papers and documents, all of which are specifically enumerated and set forth in the said subpoena, to which reference is hereby made, and which is hereby made a part hereof.

That prior to the service of the said subpoena, and on the said 13th day of June, 1905, Mr. Henry W. Taft, an assistant to the United States attorney for the southern district of New York, who was then in attendance before the said grand jury, duly made and presented to it a complaint and charge, in behalf of the United States

14 of America, against the American Tobacco Company, a corporation organized under the laws of New Jersey, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, a corporation organized under the laws of the Kingdom of Great Britain and Ireland, that the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been guilty of a violation of the so-called "Sherman" or "Anti-trust" act, being "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Statutes, 209, 1 Supp. Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and chapter 735 of the Laws of 1903, approved February 25th, 1903, in the following particulars, to wit:

(1.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland) Limited, entered into, and have ever since been engaged, within the southern district of New York and throughout the United States, in carrying out the terms of a contract in restraint of trade and commerce among the several States of the United States in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(2.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, entered into, and have

15 ever since been engaged, within the southern district of New York and throughout the United States, in carrying out the terms of, a contract in restraint of trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(3.) In that on or about the 27th day of September, 1902, and continuously since that day, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged, within the southern district of New York and throughout the United States, in an attempt to monopolize the trade and commerce, among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes,

(4.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, did combine and conspire, and ever since that day within the southern district of New York and throughout the United States they have combined and conspired, and have been engaged in carrying out a combination and conspiracy, with each other and with other persons and corporations, to monopolize the trade and commerce among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(5.) In that ever since on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged within the southern district of New York and throughout the United States, in an attempt to monopolize, and have, also, during said time and in said places, combined and conspired and have been engaged in carrying out a combination and conspiracy with each other and with other persons and corporations to monopolize the trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

17 That the said assistant district attorney acted for the said grand jury and at its request in the investigation of said charges.

That on said 14th day of June, 1905, the said William H. McAlister appeared before the said grand jury, in obedience to the said subpoena, but failed and refused, and still fails and refuses, to produce before the said grand jury, the papers and documents called for in the said subpoena. That the said documents, and each of them, are material to the investigation being conducted by the said grand jury of the charge and complaint submitted to it as aforesaid.

That the said William H. McAlister did further, on the said 14th day of June, 1905, fail and refuse, and still fails and refuses, to answer certain questions which were propounded to the said William H. McAlister before the said grand jury, by the said Henry W. Taft, as assistant to the United States attorney for the southern district of New York; that hereto annexed marked "Exhibit B," is a true and correct copy of the questions so propounded to the said William H. McAlister and a true and correct copy of the answers and refusals to answer, respectively, made by the said William H. McAlister to the said questions, and the reasons given by him for such refusals, which said Exhibit B is hereby made a part of this presentment.

That upon the appearance of the said witness before the said grand jury, on the said 14th day of June, 1905, and before any questions were propounded to the said witness, the said witness was duly advised by the said assistant United States attorney, in the hearing and presence of the said grand jury, and by the direction of the said grand jury, that the suit or the proceeding then pending before the said grand jury was a suit or proceeding upon a complaint and charge under the so-called "Sherman act," being "An act to protect trade and commerce against unlawful restraints and monopolies," and he was then and there further advised that, under chapter 755 of the Laws of the United States of 1903, approved February 25th, 1903, no person may be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence in any proceeding, suit or prosecution under the said "Sherman act," under which the aforesaid proceeding was brought; provided, however, that no person so testifying shall be exempted from prosecution, or punishment, for perjury committed in so testifying; and the said William H. McAlister was then and there further advised, by the said Henry W. Taft, as assistant to the United States attorney for the southern district of New York, and in behalf of the said grand jury, as follows:

"And I also advise you that it is the purpose of the United States Government not to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you may testify to, or on account of any evidence, documentary or otherwise, which you may

"produce in this proceeding, and that I offer you, and assure you, immunity and exemption for any such evidence, either documentary or otherwise, that you may give."

19 That each of the questions propounded to said witness, as aforesaid, and enumerated in the schedule annexed hereto and marked "Exhibit B," was pertinent to the said complaint and charge then pending before the said grand jury and was material thereto.

Wherefore, the said grand jury charges that the said William H. McAlister is in contempt of court, and asks that such proceedings may be had herein as are, in the premises, in accordance with law.

GEORGE E. WOOD, Foreman.

"EXHIBIT A."

The President of the United States to William H. McAlister, 111 Fifth avenue, New York city, N. Y., Greeting :

We command you that, all business and excuses being laid aside, you appear and attend before the grand inquest of the body of the people of the United States of America, for the southern district of New York, at a circuit court, to be held in the United States court and New York post office building, in the borough of Manhattan, city of New York, in and for the said southern district of New York, on the fourteenth day of June, 1905, at 10.30 o'clock in the forenoon, to testify and give evidence in a certain suit or proceeding now pending undetermined in the circuit court of the United States, for the southern district of New York, before the grand jury thereof, between The United States of America, as complainant, and The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States of America; and that you bring with you and produce, at the time and place aforesaid :

(1.) An agreement, bearing date September 27th, 1902, between Ogden's, Limited, of the first part; the American Tobacco Company, of the second part; the Continental Tobacco Company, of the third part; American Cigar Company, of the fourth part; Consolidated Tobacco Company, of the fifth part; British Tobacco Company, Limited, of the sixth part; and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the seventh part; a copy, or a duplicate original, of the said agreement being on file or recorded in the companies' registration office, in London, England.

(2.) An agreement providing for the transfer, to a separate company, of the export business from the United Kingdom (except to the United States) not only of Ogden's, Limited, but also of the Imperial Tobacco Company (of Great Britain and Ireland), Limited, and of Salmon & Gluckstein, Limited, and the export business, from the

United States, of the American Tobacco Company, the Continental Tobacco Company and the American Cigar Company (except to the United Kingdom), which agreement is referred to in the said last-mentioned agreement of September 27th, 1902, as having been then already prepared and executed contemporaneously therewith.

(3.) An agreement, dated September 27th, 1902, between the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the first part; Ogden's, Limited, of the second part; the American Tobacco Company, of the third part; the Continental Tobacco Company, of the fourth part; American Cigar Company, of the fifth part; Consolidated Tobacco Company, of the sixth part; and Williamson Whitehead Fuller and James Inskip, of the seventh part.

22 And for a failure to attend, and produce the above mentioned papers, you will be deemed guilty of a contempt of court and liable to pay all loss and damages sustained thereby to the party aggrieved and forfeit two hundred and fifty dollars, in addition thereto.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, the 13th day of June, one thousand nine hundred and five.

[SEAL.]

(S'd)

JOHN A. SHIELDS, Clerk.

HENRY L. BURNETT,

United States Attorney for the
Southern District of New York.

23

EXHIBIT B.

Before the United States Grand Jury.

THE UNITED STATES OF AMERICA, Complainant,

against

THE AMERICAN TOBACCO COMPANY and THE IMPERIAL TOBACCO
Company (of Great Britain and Ireland), Limited, Defendants. }

New York, June 14th, 1905.

Appearances.

Henry W. Taft, Esq., assistant United States attorney.

Felix H. Levy, Esq., assistant United States attorney.

WILLIAM H. McALISTER, being duly sworn, testified as follows :

By the WITNESS: Before being sworn, I respectfully ask to be advised what the "suit or proceeding" is which is thus described in the subpoena under which I have been summoned before this body, the nature or purpose of this "suit or proceeding," and the specific charge against the defendants, if any has been made, in

order that I may learn whether or not the grand jury has any lawful right or authority to examine me as a witness; and I also ask that I be furnished with a copy of the complaint, information or proposed bill of indictment, if any, upon which the grand jury acted, in order that I may know concerning what transactions, matters or things I am called upon to testify or produce evidence.

By Mr. TAFT: Mr. McAlister, this is a suit or proceeding now pending before the grand jury, upon a complaint and charge made, in behalf of the United States of America, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britian and Ireland), Limited, under the so-called "Sherman act," being "An act to protect trade and commerce against unlawful restraints and monopolies." Under chapter 755 of the Laws of the United States of 1903, approved February 25th, 1903, no person may be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, in any proceeding, suit or prosecution under the said "Sherman act," under which this suit or proceedings is brought; provided, however, that no person so testifying shall be exempted from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose of the United States Government not to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you may testify to, or on account of any evidence, documentary or otherwise, which you may produce in this proceeding, and that I offer you, and assure you, immunity and exemption for any such evidence, either documentary or otherwise, that you may give.

By the WITNESS: I now ask for an opportunity to consult counsel, before being sworn, or subjected to any examination, and I protest against being sworn, on the ground that there is no legal warrant or authority for my examination as a witness before this body.

By Mr. TAFT:

Q. Where do you reside and what is your occupation?

A. No. 2 West 88th St. New York city. I am secretary and a director of the American Tobacco Company.

Q. What business is the American Tobacco Company engaged in?

A. I respectfully decline to answer any further questions, on the ground, first: that there is no legal warrant or authority for my examination; second, that my answers may tend to criminate me; and, third, that my answers may tend to furnish evidence against the American Tobacco Company, of which I am secretary, and which is one of the defendants against which this investigation is directed, and that the Government, in this manner, is attempting to compel the American Tobacco Company to be a witness against itself in a criminal case.

Q. Where is the main office of the American Tobacco Company?

A. I decline to answer, for the same reasons.

Q. Where is its office in the city of New York?

A. I decline to answer, for the same reasons.

Q. Who are the officers of the American Tobacco Company?

A. I decline to answer, for the same reasons.

Q. Are you not the secretary of the American Tobacco Company?

A. Yes.

26 Q. Have you brought with you the subpoena in pursuance of which you have appeared before this grand jury?

A. No.

Q. I show you a paper purporting to be a copy of a subpoena (showing witness a paper which was marked "Exhibit A"); is that a copy of the subpoena which was served upon you, and in pursuance of which you have appeared here to-day?

A. Yes.

Q. Have you produced the papers which are called for in that subpoena, or any of them?

A. I have not, because, as I am advised by counsel, I am under no legal obligation to do so; second, because they may tend to criminate me; and, third, because they are not my property, but that of the American Tobacco Company; and are in my custody solely by reason of my official relations toward that company. Under these circumstances, my counsel advise me that the compulsion of the subpoena would, if effective, amount to an unreasonable search for, and seizure of, the company's papers and effects, in violation of its rights under the constitution, which it is my duty to protect by all lawful means, as I am now doing. I am further advised by my counsel that the subpoena which is, in effect, a warrant to search for, and seize, the papers in question was not issued upon probable cause, or supported by oath or affirmation, and is, for that reason, utterly null and void.

Q. Have you brought any of the papers or documents specified in that subpoena *duces tecum* with you to-day?

A. I have not for the reasons I have already given.

27 Q. I ask you now, in behalf of the grand jury, that you produce all of the papers and documents specified in the subpoena.

A. I decline for the same reasons to do so.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco products, cigars and cigarettes, between this country and Great Britain, and any of its colonies?

A. I decline to answer that for the same reasons given above.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland) Limited, in connection with the trade in to-

bacco, tobacco products, cigars and cigarettes, between the several States of the United States?

A. I decline to answer that for the same reasons.

Q. Were you present, in England, when an agreement, in writing, dated September 27th, 1902, was executed, between Ogden's Limited, the American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, British Tobacco Company, Limited, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, on or about the day of its date?

A. I decline to answer that for the same reasons.

Q. Is the paper which I now show you, (showing witness a paper, marked "Exhibit C"), a copy of the agreement which was then executed?

A. I decline to answer that for the same reasons.

28 (Paper marked "Exhibit C" is hereto annexed.)

Q. Is Exhibit C, now shown you, a copy of one of the papers, or documents, which you are required by the *subpoena duces tecum*, above referred to, to produce before this grand jury?

A. I decline to answer that for the same reasons.

Q. Is there an agreement, of which Exhibit C is a copy, now in force?

A. I decline to answer that for the same reasons.

An agreement made the twenty seventh day of September, one thousand nine hundred and two, between Ogden's Limited, being a company duly incorporated under English law (hereinafter referred to as the "Ogden Company"), of the first part; the American Tobacco Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, one of the States of the United States of America, (hereinafter referred to as the "American Company") of the second part; Continental Tobacco Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey, (hereinafter referred to as the "Continental Company") of the third part; American Cigar Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "cigar company") of the fourth part; Consolidated Tobacco Company, a corporation organized and existing under and by virtue of the laws of the said State of New Jersey (hereinafter referred to as the "Consolidated Company") of the fifth part; British Tobacco Company, Limited, being a company incorporated under English law (hereinafter referred to as the "British Company") of the sixth part; and the Imperial Tobacco Company (of Great Britain and Ireland,)

Limited, a corporation incorporated under English law (hereinafter referred to as the "Imperial Company") of the seventh part :

30 Whereas, the Ogden Company was incorporated to acquire and purchase from Thomas Ogden, Limited, the right of carrying on, as successor to that company, the business carried on as importers of, and dealers in, tobacco and cigars; manufacturers of, and dealers in, cigars, cigarettes and snuff, and other businesses; and (amongst other objects) to sell the business or undertaking of the Ogden Company, or any part thereof, for such consideration as the company might think fit; and, in particular, for shares, debentures or securities of any other company having objects altogether, or, in part, similar, to those of the Ogden Company; and, by the articles of association of the Ogden Company, it is provided (amongst other things) that the directors may sell the business or undertaking of the Ogden Company, or any part thereof, and may accept payment for the said business or undertaking, or for any property or rights sold, either in cash, or in shares or bonds, of any company, with or without deferred or preferred rights, or partly in one mode and partly in another, and generally on such terms as the directors may determine; and, further, that the directors may do all or any of the things or matters mentioned in the memorandum of association. And whereas, the American Company is entitled to nearly the whole of the shares of the Ogden Company, and the British Company has been formed and incorporated in the interest of the Ogden Company, and all the shares issued by the British Company are held by parties interested in the Ogden Company; and,

31 Whereas, the Imperial Company has been incorporated for the purpose (amongst other things) of carrying on the business of tobacco manufacturers, planters, growers, exporters, importers and merchants, and general dealing in tobacco, cigars, cigarettes, snuff, tobacco machinery, and other articles and things, and to purchase, or otherwise acquire and undertake, all, or any part of, the business property and liabilities of any company carrying on any business which the Imperial Company is authorized to carry on; and, by the articles of association of the Imperial Company, the directors, in addition to all powers and authorities expressly conferred upon them, are authorized to exercise all of such powers, and to do all of such acts and things as may be exercised or done by the company, and are not directed or required to be exercised or done in general meeting, and to enter into all such negotiations and contracts, and execute and do all such acts, deeds and things, in the name and on behalf of the company, as they may consider expedient for or in relation to purposes of the company; and,

Whereas, proposals have been made for amalgamating the business of the Ogden Company with that of the Imperial Company, by transfer of the business and undertaking of the Ogden Company, and of the British Company, to the Imperial Company, upon the

terms and conditions, and subject to and with the stipulations hereinafter contained or referred to.

Now, therefore, it is hereby agreed as follows, namely:—

32 (1.) The Ogden Company shall sell, and the Imperial Company shall purchase, as from the 30th day of September, 1902 (hereinafter referred to as the "transfer day") the undertaking of the Ogden Company, which expression shall be deemed to include all the lands, buildings, hereditaments, goods, chattels, stock or shares in companies, good will, formulas and recipes for the preparation, treatment, and manufacture of tobacco, patent rights, trade marks, brands, licenses, and other exclusive rights and privileges, things in action, contracts, agreements, securities, and other assets whatsoever and wheresoever belonging to the Ogden Company, except the cash in hand and at the bank, and the book and other debts belonging or owing to the Ogden Company, on the transfer day, and except, also, the export business, and the good will and trade marks of such export business of the Ogden Company, and the lands, buildings and hereditaments, goods, chattels and other effects occupied or used, or acquired for the purposes of such export business, and except, also, all funds set apart for the purpose of redeeming coupons of the Ogden Company, and the goods required for the like purpose.

(2.) The price to be paid to the Ogden Company, and for its nominees, shall be a sum equal to the aggregate of the following items, that is to say:

(a.) The value of the lands, buildings and hereditaments agreed to be sold by the Ogden Company, as the same now stand in the books of the company;

33 (b.) The value of the fixed and loose plant, live stock machinery, tools and utensils, as the same now stand in the books of the company;

(c.) The value of the stock in trade and materials at cost;

(d.) The value of the good will of the business of the Ogden Company, which is to include all patent rights, trade marks, brands, licenses, and other exclusive rights and privileges, and all the shares in the British Company, taken at the sum of one million five hundred thousand pounds (£1,500,000) payable as hereinafter provided.

The consideration for the sale aforesaid shall be satisfied as follows, that is to say:

(a.) As to the amount payable for good will, and other rights connected therewith, as hereinbefore defined under (d) in clause 2, by the allotment to the Ogden Company, or its nominees, of fully paid up ordinary shares in the Imperial Company (and consisting, as to one half, of preferred ordinary shares, and, as to the other half, of deferred ordinary shares) to be treated as of par value;

(b.) As to one equal one-third part of the balance, by the allotment to the Ogden Company, or its nominees, of fully paid up pref-

erence shares in the Imperial Company, to be treated as of par value;

(c.) As to another equal third part of the said balance, by the allotment to the Ogden Company, or its nominees, of debenture stock of the Imperial Company, to be treated as of par, value;

(d.) As to the residue, by the payment thereof in cash to the Ogden Company;

Provided, that, if one-third part of the said balance shall exceed £300,000, the Imperial Company shall not be required to satisfy more than that amount by the allotment of preference shares, and the excess of such one-third part beyond £300,000 shall be added to the debenture stock and cash prescribed by (c) and (d), in equal parts.

(4.) The Ogden Company shall clear its undertaking of all mortgages, charges and other incumbrances, and shall pay and discharge all its own debts and liabilities, and shall be entitled to receive the proceeds of all book debts due to it at the transfer day, but, for a period of three calendar months after the transfer day, the Imperial Company shall be authorized, on behalf of the Ogden Company, to collect and receive such book debts, and the proceeds shall be, from time to time, paid over to the Ogden Company, or its nominees at the end of every month.

(5.) The Imperial Company, shall, as from the transfer day, undertake the observance and performance of all covenants and conditions on the part of the lessee or tenant, in any lease of, or agreement relating to, lands, buildings and hereditaments hereby agreed to be sold, and thenceforth, on the part of the lessee or tenant to be observed and performed, and the Imperial Company shall also, as from the same date (except as in this clause hereinafter provided) undertake the performance of all contracts *bona fide* entered into by the Ogden Company, in the ordinary course of carrying on its business (other than contracts of employment with the present directors, or any of them) and shall indemnify the Ogden Company against all proceedings, claims and demands in respect thereof, provided always that the Imperial Company does not, by the foregoing stipulations of this clause, undertake any liability in connection with the customer's bonus, or the coupons or presents scheme of the Ogden Company.

(6.) All books of account of the Ogden Company, and all books of reference to customers, and other books and documents of the Ogden Company, except the statutory and minute books, and any other books of a private nature, shall be delivered to the Imperial Company, upon completion of the purchase, and the Imperial Company shall thenceforth be entitled to the custody thereof, and to the use thereof, for the purpose of carrying on its business; but, nevertheless, the Ogden Company, or its agents, shall have free access, at all reasonable times, to the said books and documents, or any of them, for any reasonable purpose, and to the temporary use of the same for the purpose of any legal proceedings.

(7.) The Imperial Company shall, from the time of any property being at its risk, be entitled to the benefit of all current insurances, and the Ogden Company shall be entitled to re-payment of a proportionate part of the premiums already paid for the unexpired portion of the current year, of any policy, and all periodical payments shall be apportioned as on the 30th of September, 1902.

(8.) The purchase shall be completed on or before the 1st day of November, 1902, at the office of Messrs. Grace, Smith & Hood, 41 Castle street, Liverpool, the solicitors for the Ogden Company, and the consideration for same shall be paid or satisfied pursuant to the provisions of this agreement, and thereupon, and from time to time, the Ogden Company shall execute and do all such assurances and things for vesting the said premises in the Imperial Company, and giving to it the full benefit of this agreement, as shall be reasonably required.

(9.) The Imperial Company shall pay interest at the rate of five (5) per cent. per annum on the portion of the purchase money payable to the Ogden Company in cash, from the transfer day until actual payment, and on the portions payable in debenture stock and preference stock, from the transfer day until the actual issue of such stock and shares respectively, and the Imperial Company shall pay interest on the portion of the said consideration, payable in ordinary shares, for the period from the transfer day until the actual issue of such shares, at the same rate per annum as shall be paid by way of dividend upon the ordinary shares of the same class in the Imperial Company, already issued, for the period comprising such interval.

(10.) As regards any of the premises subject to mortgages which cannot be paid off until after the time of completion, the Ogden Company shall, if so desired by the Imperial Company, convey the said premises, subject to the mortgages affecting the same respectively, and the Imperial Company shall retain, out of the cash portion of the consideration aforesaid, a sum sufficient to pay off and satisfy the claims under such mortgages.

(11.) In any and every case where any leaseholds hereby agreed to be sold are only assignable with the consent of the landlords from whom the same, respectively, are held, the Ogden Company shall use its best endeavors to obtain the requisite consents for the assignment thereof to the Imperial Company, and, in any case, where such consents cannot conveniently be obtained, the Ogden Company shall execute a declaration of trust, in favor of the Imperial Company, or otherwise deal with the same, as the Imperial Company shall direct.

(12.) The possession of the property hereby agreed to be sold, shall be delivered by the Ogden Company to the Imperial Company on the transfer day, and, in the meantime, the Ogden Company shall carry on its business and maintain the same as a going concern.

(13.) For the purposes of title and conveyance of the lands, buildings and hereditaments, the Ogden Company, and the Imperial Company, shall, respectively, be deemed and taken to have entered

into this contract subject to the terms and stipulations of the Liverpool public sale conditions, so far as the same shall be applicable to a sale by private contract.

38 (14.) Each of the parties hereto of the first six parts, for itself, and not the one for any others, agrees, and shall covenant with the Imperial Company, that the covenanting party will not, at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly with any other person or persons, company or companies, directly or indirectly, carry on, or be employed, engaged, or concerned or interested in the business, in the United Kingdom, of a tobacco manufacturer, or in any dealing in tobacco, or its products therein, or sanction the use of its name in connection with any such business therein, save so far as the covenanting company shall, as a member of the Imperial Company, or as a member of any company manufacturing cigars in the United States, or of any other companies formed, or to be formed, with the concurrence of the Imperial Company, be interested in the business thereof, or through, or in connection with the Imperial Company, as hereinafter provided. The said covenanting parties will procure the following directors, or some one of them, namely, James Buchanan Duke, Benjamin Newton Duke, Thomas Fortune Ryan, John Blackwell Cobb, Williamson Whitehead Fuller, William Rees Harris, Percival Smith Hill and Caleb Cushing Dula, and will respectively use their best endeavors to procure such other directors as shall be required by the Imperial Company to enter into a covenant with the Imperial Company similar to that referred to in the preceding part of this clause.

39 (15.) The Imperial Company similarly agrees, and shall covenant with the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, that the Imperial Company will not, at any time after the transfer day, except as hereinafter expressly excepted, either solely or jointly with any other person or persons, company or companies, directly or indirectly, carry on, or be employed, engaged, concerned or interested in the business, in the United States, of a tobacco manufacturer, or in any dealing in tobacco, or its products therein, or sanction the use of its name in connection with any such business therein, save so far as the Imperial Company shall, as a member of any other company formed, or to be formed, with the concurrence of the American Company, the Continental Company, the Cigar Company, or the Consolidated Company, be interested in the business thereof, and save and except that the Imperial Company shall be at liberty to buy and treat tobacco leaf and other materials in the United States, for the purpose of its business, and save and except such business as shall be carried on through, or in connection with, the American Company, the Continental Company, the Cigar Company, or the Consolidated Company, as hereinafter provided, the Imperial Company will procure the following of its directors, viz., Sir William Henry Wills, Henry Overton Wills, Sir Edward Payson Wills,

Sir Frederick Wills, George Alfred Wills, Henry Herbert Wills, Walter Melville Wills, Charles Edward Lambert, John Dane Player, Walter Butler, William Goodacre Player and William Rud-
 40 dell Clarke, and will use its best endeavors to procure such other of its directors as shall be required by the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, to enter into a covenant similar to that referred to in the preceding part of this clause.

(16.) Forthwith, or as soon as may be after the transfer day, the Imperial Company shall duly appoint to its board, three (3) directors, nominated by the Ogden Company, subject to their acquiring the necessary qualifications, and the directors so appointed shall be re-elected, at the next ordinary general meeting, and shall be classified so that only a due proportion of them shall retire in each year.

(17.) The export business of the Ogden Company, hereinbefore excluded from the operation of this contract, is to be the subject of an agreement entered into contemporaneously with this agreement, and providing for the transfer, to a separate company, of the export business from the United Kingdom (except to the United States) not only of the Ogden Company, but also of the Imperial Company, and of Salmon & Gluckstein, Limited, and the export business from the United States of the American Company, the Consolidated Company, and the Cigar Company (except to the United Kingdom) which agreement has already been prepared and is executed contemporaneously with this agreement. For the purpose of construing this agreement, the export business of the said several companies shall be deemed to be herein defined in the same manner as
 41 in the said contemporaneous agreement. The "United Kingdom" and the "United States" are also, respectively to be deemed to be defined as defined in the same agreement.

(18.) From and after the date of transfer, subject to agreements already existing between the Imperial Company, and its present agents, neither the Imperial Company, nor Salmon & Gluckstein, Limited, shall sell or consign any tobacco products to any person, firm or company within the United States, except the American Company, or persons or companies designated by it; and, on the other hand, the American Company, the Continental Company, and the Cigar Company, and the Consolidated Company, respectively, shall not sell or consign any tobacco products to any person, firm or company in the United Kingdom, except the Imperial Company, or any person or companies designated by it, the intention being that the American Company, or its nominees, shall be the sole customer of the Imperial Company, and of Salmon & Gluckstein, Limited, in the United States, and that the Imperial Company, or its nominees, shall be the sole customer of the American Company, the Continental Company, and the Cigar Company, in the United Kingdom. None of the parties shall sell any tobacco products to any person, firm or company whom they have reason to believe will ex-

port the same to the territory in which the seller has agreed not to sell such goods as herein provided.

(19.) For American goods sold to the Imperial Company, or its nominees, for sale in the United Kingdom, in pursuance of the preceding clause, the Imperial Company shall pay the cost of manufacture and packing of such goods (but not including any expenses of advertising and selling) plus ten per cent. (10%) and shall also pay freight, customs charges and duties; and for goods of the Imperial Company, and of Salmon & Gluckstein, Limited, sold by them to the American Company, the Continental Company, or the Cigar Company, for sale within the United States, the American Company, the Continental Company, or the Cigar Company, as the case may be, shall pay the cost of the manufacture and packing thereof (but not including any expenses of advertising or selling) plus ten per cent. (10%), and shall also pay freight, customs charges and duties. In all cases of sales under this clause, the invoices of the respective vendors shall be final and binding as to cost. The Imperial Company shall be empowered by the American Company, and the Continental Company, to manufacture their brands within the United Kingdom, for sale therein, and the American Company, the Continental Company, and the Cigar Company, shall be empowered to manufacture the brands of the Imperial Company in the United States, for sale therein, and each party shall manufacture the brands of the other party upon recipes and formulae to be supplied by the other.

(20.) As nearly as practicable, and subject to existing contracts and obligations of the companies manufacturing and selling the cigars and cigarettes hereinafter referred to, the American Company, 43 the Continental Company, and the Cigar Company will appoint, or procure the appointment of, the Imperial Company, sole agent for the sale, within the United Kingdom, of Havana and Porto Rico cigars, and Havana and Porto Rico cigarettes, directly or indirectly controlled by the American Company, the Continental Company and the Cigar Company, and such agency shall be upon the terms of the Imperial Company, receiving a net commission of seven and one half per cent. ($7\frac{1}{2}\%$) upon the Havana and Porto Rico prices respectively, and being allowed three months' credit for payment of the invoice prices, less such $7\frac{1}{2}\%$, and the Havana and Porto Rico prices charged the Imperial Company shall, from time to time, and at all times, be as low as the prices charged by the American Company, the Continental Company, and the Cigar Company, or parties controlled by them, for similar cigars and cigarettes sold to their most favored customers, subject only to the exception that if, at any time, the prices of cigars or cigarettes sold to any country not affecting British trade, shall be temporarily reduced, for the purposes of competition, such local and temporary reduction is not to be taken into account for the purpose of fixing the price of cigars and cigarettes sold to the Imperial Company. If, and so far as the control of any other cigar trade not hereinbefore provided

for, is now possessed, or shall be acquired by the American Company, the Continental Company, and the Cigar Company, or any of them, a similar agency is to be given to the Imperial Company in respect thereof. The Imperial Company shall not (except to

complete any other contract already made) handle or sell
 44 any other Havana or Porto Rico cigars and cigarettes than those of the American Company, the Continental Company, and the Cigar Company, for which the Imperial Company holds the aforesaid agency, and a similar provision shall apply to any other cigars or cigarettes for which the aforesaid agency may be hereafter granted, and the Imperial Company shall use its best efforts and endeavors to promote and enlarge the sales of all such cigars and cigarettes within the United Kingdom, and, provided the Imperial Company maintains a sale of the Havana cigars or cigarettes included in the agency hereinbefore provided for, equal to not less than seventy two per cent. (72%) of the total annual importations into the United Kingdom, duty paid, of cigars and cigarettes made in Cuba, the American Company, and the Cigar Company, and the Continental Company, shall not be entitled to call in question the efforts and endeavors of the Imperial Company hereinbefore required, provided, always, that the percentage to be maintained by the Imperial Company shall be ascertained upon the average of three years. The Imperial Company shall sell the cigars and cigarettes, from time to time falling within the said agency, at prices not exceeding their cost to the Imperial Company, with the addition of freights, railway charges, packages, customs duties and customs charges, and the said commission of $7\frac{1}{2}$ per cent. The American Company, the Continental Company, and the Cigar Company, will not, knowingly, supply cigars or cigarettes to be transhipped or indirectly imported into the United Kingdom.

45 The aforesaid proportion of 72 per cent. has been based upon the belief and assumption that the parties hereto of the second part, third, fourth and fifth parts, or some or one of them, control, or will shortly control, not less than 80 per cent. of the aforesaid annual importations, and if it shall hereafter appear that the proportion thereof actually controlled by the said parties is less than 80 per cent., then, and in such case, the said proportion of 72 per cent. shall be correspondingly reduced.

(21.) The Imperial Company shall cause Salmon & Gluckstein, Limited, and A. I. Jones & Company, Limited, and any other companies, firms or persons, from time to time controlled by it (subject to the performance of any prior contracts) to purchase their cigars of any brands, comprised in the said agency, through the Imperial Company as agent under the last preceding clause.

(22.) The American Company, the Continental Company, the Cigar Company, and the Consolidated Company, together with their directors entering into the covenant aforesaid, are to give to the Imperial Company, in the United Kingdom, the full benefit of their good will and support; and, on the other hand, the Imperial Com-

pany, together with its directors, entering into the covenant aforesaid, are to give the American Company, the Continental Company, and the Cigar Company, in the United States, the full benefit of their good will and support, and, with a view to giving further
46 effect to the intention of the parties, as in this clause hereinbefore expressed, the allottees of the said 1,500,000 ordinary shares of the Imperial Company are not to sell or transfer more than 10 per cent. of the said shares, within the period of five (5) years from the date of their allotment, if and so long as the present directors of the Imperial Company, or some of them, shall hold not less than 3,000,000 ordinary shares of the Imperial Company.

(23.) This agreement is to be construed and take effect as a contract made in England, and in accordance with the law of England, but to the intent that any of the parties may sue in its own country. The Imperial Company is always to have an agent for service in the United States, and each of them, the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, is always to have an agent for service in England, and service on any such agent of any notice, summons, order, judgment, or other process or document in respect of this agreement, or any matter arising thereout, shall be deemed to be good service on the party appointing such agent, and, as regards each of the said parties, whilst and whenever there is no other agent, the following shall be considered to be the agents of the respective parties duly appointed under this clause, namely:

For the Imperial Company, Samuel Untermyer, of New York city, American counsel, and for the American Company, the Continental Company, the Cigar Company, and the Consolidated Company, Joseph Hood, 41 Castle street, Liverpool, solicitor.

47 Notice of any appointment under this clause shall be, from time to time, given by the appointer to the other parties hereto. The mode of service sanctioned by this clause is not, in any way, to prejudice or preclude any mode of service which would be allowable if this clause were omitted.

(24.) So far as it is necessary for the purpose of making the issue of ordinary shares hereinbefore mentioned, the Imperial Company shall forthwith take the necessary steps for increasing its capital, by the creation of an adequate number of ordinary shares (half preferred and half deferred) which shall rank *pari passu* with, and shall be of the same respective classes, and confer the same rights and privileges as, the 5,000,000 preferred ordinary shares, and the 5,000,000 deferred ordinary shares forming part of the original capital of the Imperial Company.

In witness whereof, the said parties of the first, second, sixth and seventh parts have hereunto affixed their common seals, and the said parties of the third, fourth and fifth parts have executed this

agreement under the hand of their respective presidents, the day and year first above written.

(THE IMPERIAL TOBACCO COMPANY OF GREAT BRITAIN AND IRELAND, *LAND*, LIMITED.)

The common seal of the Imperial Company was hereunto affixed by order of the board in the presence of

GEORGE ALFRED WILLS,

C. E. LAMBERT,

Directors.

H. W. GUNN, Secretary.

48

(OGDEN'S LIMITED.)

The common seal of Ogden's Limited was hereunto affixed in the presence of

R. W. WALTERS,

JOHN MacCONNAL,

Directors.

(BRITISH TOBACCO COMPANY, LIMITED.)

The common seal of British Tobacco Company, Limited, was hereunto affixed in the presence of

R. W. WALTERS,

JOSEPH HOOD,

Directors.

(THE AMERICAN TOBACCO COMPANY.)

The common seal of the American Tobacco Company was hereunto affixed in the presence of

J. B. DUKE, Pres't.

(CONTINENTAL TOBACCO CO.),

By J. B. DUKE, Pres't.

Continental Tobacco Company has executed this agreement, under the hand of James Buchanan Duke, its president, in the presence of

JOSEPH HOOD,

Solicitor, Liverpool.

AMERICAN CIGAR CO.,

By J. B. COBB, Pres't.

American Cigar Company has executed this agreement under hand of John Blackwell Cobb, its president, in the presence of

W. R. HARRIS,

Director American Cigar Co.

CONSOLIDATED TOBACCO CO.,
By J. B. DUKE, Pres't.

Consolidated Tobacco Company has executed this agreement under the hand of James Buchanan Duke, its president, in the presence of

W. R. HARRIS,
Treasurer Consolidated Tobacco Co.

A true copy.

H. F. BARTLETT,
Registrar of Joint Stock Companies.

Consulate-General of the United States of America for Great Britain and Ireland, at London.

I, Henry Clay Evans, consul-general of the United States of America for Great Britain and Ireland at London, do hereby
49 make known and certify to all whom it may concern, that the signature "H. F. Bartlett," subscribed to the annexed certificate, is of the true and proper handwriting of H. F. Bartlett, registrar of joint stock companies, that the "companies registration office" in London has no official seal, and that to all acts signed as the annexed full faith and credit are and ought to be given in judicature and thereout.

In testimony whereof I have hereunto set my hand and affixed the seal of the consulate-general of the United States at London, aforesaid, this 8th day of March, 1905.

H. CLAY EVANS,
Consul General.

[SEAL.]

(Endorsed :) Circuit court of the United States, for the southern district of New York.—The United States of America, complainant, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants.—Presentment of grand jury.—Dated June 14th, 1905.—U. S. circuit court, southern district of New York, Filed Jun-14, 1905, John A. Shields, clerk.

50

"D."

UNITED STATES OF AMERICA,
Southern District of New York, City and }
County of New York.

To the Hon. E. Henry Lacombe, judge of the United States circuit court for the southern district of New York.

SIR: The grand jury for the May term, 1905, respectfully represents to your honor and charges that William H. McAlister is guilty of contempt of court, in this:

Whereas, on the 13th day of June, 1905, a subpoena in due form was duly served upon the said William H. McAlister commanding him to appear before the said grand jury at a certain time named in the said subpoena, to-wit, on the 14th day of June, 1905, to testify and give evidence in a certain suit or proceeding then pending undetermined in the circuit court of the United States for the southern district of New York, before the grand jury thereof, between The United States of America, as complainant, and The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States of America, and to produce at the said time and place certain papers and documents, all of which are specifically enumerated and set forth in the said subpoena; and,

51 Whereas, the said William H. McAlister did appear before the said grand jury on the 14th day of June, 1905, in obedience to said subpoena, but did fail and refuse to produce before the said grand jury the aforesaid papers and documents; and the said papers and documents were then and now are material to a charge or complaint under investigation before the said grand jury in said suit or proceeding; and

Whereas, the said William H. McAlister did, on the said 14th day of June, 1905, further fail and refuse to answer certain questions pertinent to the said charge and complaint under investigation, as aforesaid, and material thereto, propounded to him by the said grand jury; and,

Whereas, the said grand jury did on the 14th day of June, 1905, duly present the foregoing facts to this honorable court, by a presentment in writing, duly signed by the said grand jury, by and through George E. Wood, Esq., its foreman, which presentment in writing was duly filed in the office of the clerk of this court on said 14th day of June, 1905, and to which presentment for greater particularity reference is hereby made, and the same is hereby made a part hereof in the same manner as if the same were here repeated at length; and

Whereas, your honor did on the said 14th day of June, 1905, duly consider the said presentment, and the said William H. Mc-
52 Alister, being then present in open court, your honor did then and there make the following order, to wit:

"The witness is hereby directed to answer the questions as propounded by the grand jury and forthwith to produce before the grand jury the papers and documents called for in the subpoena.

"The grand jury may now withdraw, and the witness will attend before it forthwith."

That thereupon and in obedience to the said order, the said grand jury did thereupon withdraw to the grand jury room, together with the said William H. McAlister, and thereupon the said William H. McAlister was again asked the questions which are set forth in Exhibit B, attached to the said presentment, and which the said William H. McAlister had failed and refused to answer as aforesaid;

and the said William H. McAlister was further then and there asked to produce the papers and documents called for by the *sub-pœna duces tecum* served upon him, as aforesaid, and which papers and documents the said William H. McAlister had failed and refused to produce before the said grand jury, as set forth in the said presentment duly filed herein on the 14th day of June, 1905, as aforesaid; that the said William H. McAlister did then and there again fail and refuse to answer the said questions, and did then and there fail and refuse to produce the said papers and documents, which said questions the said William H. McAlister had been 53 directed by the court herein as aforesaid to answer and which said papers and documents the said William H. McAlister had been directed by the court herein as aforesaid to produce.

That a copy of the minutes of the proceedings before the grand jury held on the said 14th day of June, 1905, and at which the said William H. McAlister did again fail and refuse to answer the questions which he was directed by the court herein to answer, as aforesaid, and at which he failed and refused to produce the papers and documents which he was directed by the court herein to produce, is hereto annexed, the same being a true and correct transcript of the minutes of the said proceedings and of the whole thereof and marked "Schedule I," and made a part hereof.

That the said papers and documents were then and now are material to the investigation of the aforesaid complaint and charge being conducted before the said grand jury, and that the said questions propounded to the said William H. McAlister, as aforesaid, were and are pertinent to the said investigation and material thereto.

Wherefore, the said grand jury charges that the said William H. McAlister is in contempt of court, and asks that such proceedings may be had as in the premises are in accordance with law.

GEORGE E. WOOD, Foreman.

54

SCHEDULE 1.

Before the United States Grand Jury.

THE UNITED STATES OF AMERICA, Complainant,	}
against	
THE AMERICAN TOBACCO COMPANY and THE IMPERIAL TOBACCO Company (of Great Britain and Ireland), Limited, Defendants.	

NEW YORK, N. Y., June 14th, 1905.

Present: The grand jury, Mr. Taft, Mr. Levy.

The grand jury, and the counsel, and the witness William H. McAlister, repair to the rooms of the United States circuit court, and appear before Hon. E. Henry Lacombe, circuit judge.

The grand jury thereupon filed the presentment, dated June 14th, 1905, setting forth the failure and refusal of the witness McAlister

to answer the questions propounded to him before the grand jury, and to produce the papers and documents set forth in the subpoena served upon him. Judge Lacombe thereupon made the following order:

55 "The witness is hereby directed to answer the questions as propounded by the grand jury, and forthwith to produce, before the grand jury, the papers and documents called for in the subpoena.

"The grand jury may now withdraw, and the witness will attend before it forthwith."

The grand jurors, the counsel for the Government, and the witness William H. McAlister, then returned to the grand jury room.

Examination of WILLIAM H. MCALISTER resumed.

By Mr. TAFT:

Q. You have been directed by Judge Lacombe, of the circuit court, to answer the questions which were propounded to you by me this morning, do you so understand?

A. Yes.

Q. You have also been directed by the court to produce the papers and documents enumerated in the subpoena served upon you in this matter, do you so understand?

A. Yes.

Q. I now ask you whether you will now answer the questions which were propounded to you by me this morning and which you then refused to answer?

A. I decline to answer, for the same reasons that I gave this morning.

Q. Do you decline to answer the said questions, for the same reasons given by you when you refused to answer the questions this morning, before you were directed by the court to answer the same?

A. Yes.

56 Q. Will you now produce before the grand jury the papers and documents called for in the subpoena served upon you and in pursuance of which you attended before the grand jury this morning?

A. No, for the same reasons that I declined to do so this morning, before going before Judge Lacombe.

Q. Do you decline to produce those papers and documents, for the same reasons given by you when you were asked to produce the same before the grand jury this morning?

A. Yes.

Q. Have you brought any of the papers mentioned in that subpoena?

A. I decline to answer, for the same reasons I gave before.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in to-

bacco, tobacco products, cigars and cigarettes, between this country and Great Britain or any of its colonies?

A. I decline to answer, for the reasons that I gave this morning.

Q. Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco, tobacco products, cigars and cigarettes, between the several States of the United States?

A. I decline to answer for the reasons that I gave this morning.

Q. Where is the main office of the American Tobacco Company?

A. I decline to answer, for the same reasons.

Q. Where is its office in the city of New York?

A. I decline to answer, for the same reasons.

Q. Who are the officers of the American Tobacco Company?

A. I decline to answer, for the same reasons.

Q. Is the paper which I now show you (showing witness a paper, marked "Exhibit C," and annexed to the presentment heretofore filed by the grand jury, on June 14th, 1905), a copy of the agreement which was executed, in England, dated September 27th, 1902, between Ogden's, Limited, the American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, British Tobacco Company, Limited, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited?

A. I decline to answer, for the reasons stated before.

Q. Is there an agreement, of which the said paper marked "Exhibit C," is a copy, now in force?

A. I decline to answer, for the reasons stated before.

58 (Endorsed :) Circuit court of the United States, for the southern district of New York.—The United States of America, complainant, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants.—Presentment of grand jury.—Dated June 14th, 1905.—U. S. circuit court, southern district New York, Filed Jun-14, 1905, John A. Shields, clerk.

59 At a stated term of the circuit court of the United States of America, in and for the southern district of New York in the second circuit, held at the United States court and post office building in the borough of Manhattan, in the city of New York on the 14th day of June, 1905.

Present: Hon. E. Henry Lecombe, circuit judge.

In the Matter of the Application of WILLIAM H. McALISTER for a Writ of *Habeas Corpus*.

On reading and filing the petition of the above named William H. McAlister, verified the 14th day of June, 1905, for a writ of *habeas*

corpus, directed to William Henkel, Esquire, United States marshal in and for the southern district of New York, requiring him to bring and have the petitioner before this court together with the true cause of his detention and restraint of the petitioner, to the end that this court may act thereupon as of right and according to law ought to be done, and it appearing from the said petition itself that the petitioner is not entitled to said writ: Now after hearing De Lancey Nicoll, Esquire, of counsel for the petitioner, in support of the said application, and due deliberation having been had, it is

Ordered that such application be, and the same hereby is, in all things denied.

Enter.

E. HENRY LACOMBE,
United States Circuit Judge.

60 (Endorsed:) Circuit court of the United States, southern district of New York.—In the matter of the application of William H. McAlister, for a writ of *habeas corpus*.—Order denying application for writ of *habeas corpus*.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—Due service of the within order is hereby admitted this 14th day of June, 1905. Henry L. Burnett, U. S. att'y. William Henkel, U. S. marshal.—U. S. circuit court, southern district of New York, Filed Jun-14, 1905, John A. Shields, clerk.

61 Supreme Court of the United States.

In the Matter of the Application of WILLIAM H. MCALISTER for Writ of *Habeas Corpus*.

WILLIAM H. MCALISTER, Appellant,
vs.

WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.

Know all men by these presents, that we, William H. McAlister, as principal, and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of one thousand dollars (\$1000) to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of June, 1905.

Whereas, lately, to wit, on the 14th day of June, 1905, at a circuit court of the United States in and for the southern district of New

York, in a proceeding therein pending a final order was entered denying the petitioner's application for a writ of *habeas corpus*; and,

Whereas, the said petitioner has duly obtained an appeal from the said order to the Supreme Court of the United States and
62 has filed a copy thereof in the clerk's office of the said circuit court to review the same; and

Whereas the said court, good cause therefor being shown, has by order this day duly made and entered directed that the petitioner may be enlarged upon recognizance, with sufficient surety, in the sum of one thousand dollars (\$1000) for his appearance to answer the judgment of the said Supreme Court; now the condition of this recognizance is such, that if the said petitioner, William H. McAlister shall appear to answer the judgment of the Supreme Court upon the said appeal, then this recognizance shall be void, else to remain in full force and effect.

[SEAL.] WILLIAM H. McALISTER. [SEAL.]
THE UNITED STATES FIDELITY &
GUARANTY COMPANY,
By W. C. SCHRYVER, Attorney in Fact.

Attest: ALONZO G. OAKLEY,
Attorney in Fact.

Sworn to and acknowledged before me this 14th day of June, 1905.

[SEAL.] JOHN A. SHIELDS,
U. S. Commissioner.

63 Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.

We Will Bond You.

(Cut.)

STATE OF NEW YORK, }
County of New York, } ss:

Before me personally came Walter C. Schryner, known to me to be the att'y in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of William H. McAlister as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the att'y in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August

13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of William H. McAlister is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as att'y in fact of said company; and that he is acquainted with Alonzo G. Oakley and knows him to be attorney in fact of said company; and that the signature of said Alonzo G. Oakley subscribed to said bond is the genuine handwriting of said Alonzo G. Oakley and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000.00).

W. C. SCHRYNER.

64 Sworn to, acknowledged before me, and subscribed in my presence this 14th day of June, 1905.

[SEAL.]

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—McAlister vs. Henkel, U. S. marshal.—Bond.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district New York. Filed Jun-14, 1905. John A. Shields, clerk.

65 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of WILLIAM H. MCALISTER for a Writ of *Habeas Corpus*.

WILLIAM H. MCALISTER, Appellant,	}
vs.	
WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee.	

SIRS: Please take notice that William H. McAlister, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order made and entered herein on the 14th day

said petition and that he desires in good faith to submit these questions to the Supreme Court for their determination.

68 And your petitioner will ever pray.

NICOLL, ANABLE & LINDSAY,
Solicitors and Counsel for the Petitioner,
31 Nassau Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

William H. McAlister, being duly sworn, says: That he is the petitioner above named and that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

WILLIAM H. McALLISTER.

Sworn to before me this 14th day of June, 1905.

JOHN A. SHIELDS,
U. S. Commissioner.

The foregoing petition for appeal is granted and the claim of the appellant therein made is allowed. Supersedeas bond fixed at two hundred and fifty dollars (\$250.00). And good cause therefor being shown, pending the said appeal the petition- may be enlarged upon recognizance, with sufficient surety in the sum of one thousand dollars (\$1,000.00), for his appearance to answer the judgment of the Supreme Court. Done in open court this 14th day of June, 1905.

E. HENRY LACOMBE,
United States Circuit Judge.

69 (Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of William H. McAlister, for writ of *habeas corpus*.—William H. McAlister, appellant, vs. William Henkel, marshal in and for the southern dist. of N. Y., appellee.—Petition for appeal & allowance thereof.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—Due service of the within petition is hereby admitted this 14th day of June, 1905. Henry L. Burnett, U. S. att'y.—William Henkel, U. S. marshal.—U. S. circuit court, southern district of New York, Filed Jun- 14, 1905, John A. Shields, clerk.

70 In the Supreme Court of the United States.

In the Matter of the Application of WILLIAM H. McALISTER for
Writ of *Habeas Corpus*.

WILLIAM H. McALISTER, Appellant,

vs.

WILLIAM HENKEL, Marshal in and for the Southern District of
New York, Appellee.

Now comes the petitioner, William H. McAlister, by Nicoll, Annable & Lindsay, his attorneys, in connection with his petition of appeal to the Supreme Court from the order of the circuit court of the United States in and for the southern district of New York, entered herein on the 14th day of June, 1905, denying his application for a writ of *habeas corpus* herein, and makes and files the following assignment of errors:

The court erred:

1. In denying the petitioner's application for a writ of *habeas corpus*.

2. In deciding that it appears from the petition itself that the petitioner is not entitled to the said writ.

3. In holding that the petitioner is lawfully held in custody under the commitment of the circuit court dated the — day of June, 1905, and referred to in the said petition.

4. In holding that the circuit court had jurisdiction under the Constitution and laws of the United States by reason of any of the matters or things contained and set forth in the present-

71 ments or reports of the grand jury referred to in the said petition, or either of them, to entertain any charge or charges of contempt against the petitioner, or to act or proceed in any manner in the premises.

5. In holding that at the time the petitioner attended before the grand jury and was examined in the manner and under the circumstances disclosed by the said presentments or reports, there was any "suit or proceeding" of any kind whatever depending in the circuit court or before the grand jury between the United States and The American Tobacco Company and The Imperial Tobacco Company, Limited, defendants, in which the petitioner could lawfully be required under said Constitution and laws to testify or give evidence before the grand jury.

6. In holding that the grand jury was in the exercise of its proper and legitimate authority in prosecuting the so-called "suit or proceeding" described in the said reports or presentments.

7. In holding that section 1 of the legislative, executive and judicial appropriation act approved February 25, 1903, gave the petitioner immunity from prosecution for or on account of transactions,

matters or things concerning which he was directed to testify and produce evidence before the grand jury.

8. In holding that the inquiry before the grand jury upon which the petitioner was required to testify and produce papers and documents under the circumstances set forth in the petition was a suit or proceeding, under the so-called Sherman act, being "An act to protect trade and commerce against unlawful restraint and monopolies" (26 Stat. 209), and the acts amendatory thereof and supplemental thereto and particularly the said act of February 25, 1903.

72 9. In holding that the petitioner was not privileged under the Constitution and laws of the United States and particularly by the fifth amendment to the Constitution to refuse to testify or produce evidence before the said grand jury upon the said inquiry when by so doing he might incriminate himself.

10. In holding that the order of the court directing the petitioner to testify and produce evidence before the grand jury was not, in effect, an attempt to compel the American Tobacco Company to bear witness against itself in a criminal case, in violation of the said fifth amendment.

11. In holding the rights and privileges of the American Tobacco Company under the said amendment would not have been violated by the petitioner's compulsory examination before the grand jury.

12. In holding that the said act of February 25, 1903, does not usurp and infringe upon the pardoning power exclusively vested in the President of the United States by the express terms of section 2 of article II of the Constitution of the United States.

13. In holding that the said act of February 25, 1903, does not infringe upon and set at naught the express provisions of article X of the amendments to the Constitution of the United States, whereby the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States, respectively, or to the people.

14. In holding that the said act of February 25, 1903, does not deprive the various States of the United States of the sovereign right and power reserved to them by the said article X to prosecute and punish persons concerned in transactions, matters and things which

73 violate their own laws, provided such persons testify or produce evidence documentary or otherwise, concerning such transactions, matters and things in proceedings, suits or prosecutions under the three acts mentioned in the said act of February 25, 1903.

15. In holding that the said act of February 25, 1903, does not impair the right of the various States of the United States under article X, aforesaid, to prosecute and punish offenders against their own peace and dignity.

16. In holding that the said act of February 25, 1903, by undertaking in effect to grant pardons to persons who have been concerned in transactions, matters or things violative of the laws of the various

States, provided such persons testify and produce evidence documentary or otherwise, concerning such transactions, matters or things in proceedings, suits or prosecutions under the statute therein mentioned, does not usurp the power expressly reserved to the States by article X, aforesaid, to grant or withhold pardons and to provide for and deal with the granting or withholding or granting therein in accordance with their own constitution and laws.

17. In holding that the said act of February 25, 1903, requires a person to testify or produce evidence in proceedings, suits or prosecutions under the three acts therein mentioned, notwithstanding such testimony or production may tend to criminate him.

18. In holding that the order of the circuit court directing the petitioner forthwith to produce the papers called for by the *subpoena duces tecum* was not made in violation of the petitioner's rights under the fourth amendment of the Constitution of the United States, providing that the right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

74 19. In holding that the said order was not in effect a warrant to search for and seize the papers mentioned in the *subpoena duces tecum*, and was not issued in violation of the said fourth amendment.

20. In holding, the papers mentioned in the said subpoena being the property of the American Tobacco Company and in the petitioner's custody solely, by reason of his official relations toward that company, that the compulsion of the said subpoena and of the order that he produce such papers thereunder would not, if effective, amount to an unreasonable search for and seizure of the papers and effects of the said corporation in violation of its rights under the said fourth amendment.

21. In holding that by refusing to comply with the requirements of the said subpoena and of the order of the circuit court that he produce the said papers thereunder, the petitioner was not protecting by lawful means the company's right under the said fourth amendment to be secure in its papers and effects against unreasonable searches and seizures.

22. In holding that the petitioner was under a legal obligation to enforce and obey the said order of June 14, 1905.

23. In holding that it was not the petitioner's duty as an officer and director of the said corporation to disobey the said subpoena and order.

24. In holding that the order of the circuit court of June 14th, 1905, adjudging the petitioner guilty of contempt and the commitment issued pursuant to the said order were not without legal right, authority or jurisdiction of any kind and were not utterly void and ineffectual and that the petitioner's detention and imprisonment thereunder was not in violation of the Constitution of the United States, and in violation of his rights, privileges and immunities thereunder.

75 By reason whereof the petitioner prays that the said order discharging the writ of *habeas corpus* herein and remanding the petitioner to the custody of the appellee be reversed and that he be dismissed and released from all further restraint in the premises.

WILLIAM H. McALISTER, Petitioner.

NICOLL, ANABLE & LINDSAY,
Counsel for Petitioner.

Read the 14th day of June, 1905.

E. HENRY LACOMBE,
United States Circuit Judge.

(Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of William H. McAlister for a writ of *habeas corpus*.—William H. McAlister, appellant, vs. William Henkel, marshal in and for the southern dist. of N. Y., appellee.—Assignment of errors.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau street, New York.—U. S. circuit court, southern district New York, Filed Jun-14, 1905. John A. Shields, clerk.

76 Supreme Court of the United States.

In the Matter of the Application of WILLIAM H. McALISTER for Writ of *Habeas Corpus*.

WILLIAM H. McALISTER, Appellant,
vs.

WILLIAM HENKEL, Marshal in and for the Southern District of New York, Appellee. }

Know all men by these presents that we, William H. McAlister as principal and the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, having an office and usual place of business at No. 66 Liberty street, in the city of New York, as surety, are held and firmly bound unto the United States of America in the full and just sum of two hundred and fifty dollars (\$250.00) to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 14th day of June, 1905.

Whereas, lately, to wit, on the 14th day of June, 1905, at a circuit court of the United States in and for the southern district of New York, in a proceeding therein pending a final order was entered denying the petitioner's application for a writ of *habeas corpus*; and,

Whereas, the said petitioner has duly obtained an appeal from the said order to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the said circuit court to review the same,

Now the condition of the above obligation is such, that if the said petitioner, William H. McAlister shall prosecute said appeal to effect and shall answer all costs therefor, or failing to make the said appeal good, then the above obligation to be void, else to remain in full force and effect.

[SEAL.]

WILLIAM H. McALISTER. [SEAL.]
THE UNITED STATES FIDELITY &
GUARANTY COMPANY,

By W. C. SCHRYVER, Attorney in Fact.

Attest: ALONZO G. OAKLEY,
Attorney in Fact.

Sworn to and acknowledged before me this 14th day of June, 1905.

[SEAL.]

JOHN A. SHIELDS.
U. S. Commissioner.

78 Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.

We will Bond You.

(Cut.)

STATE OF NEW YORK, }
County of New York, } ss:

Before me personally came Walter C. Schryner, known to me to be the att'y in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of William H. McAlister as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the att'y in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of William H. McAlister is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as att'y in fact of said company; and that he is acquainted with Alonzo

G. Oakley and knows him to be attorney in fact of said company; and that the signature of said Alonzo G. Oakley subscribed to said bond is the genuine handwriting of said Alonzo G. Oakley and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars (\$1,000,000.00).

W. C. SCHRYNER.

79 Sworn to, acknowledged before me, and subscribed in my presence this 14th day of June, 1905.

[SEAL.] JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

(Endorsed :) Circuit court of the United States, for the southern district of New York.—McAlister vs. Henkel, U. S. marshal.—Bond.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. circuit judge.—U. S. circuit court, southern district New York, Filed Jun-14, 1905, John A. Shields, clerk.

80 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States, in the second circuit, to Honorable Henry L. Burnett, United States attorney for the southern district of New York, and to William Henkel, United States marshal in and for the southern district of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the Capitol in the city of Washington in the District of Columbia, on the 11th day of July, 1905, pursuant to a petition, allowance and notice of appeal filed in the clerk's office in the circuit court of the United States for the southern district of New York, wherein one William H. McAlister is the appellant and you, the said marshal are appellee, to show cause, if any there be, why the final order of the said circuit court in the said petition, allowance and notice of appeal mentioned should not be corrected and speedy justice done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above mentioned, this 14th day of June, 1905.

E. HENRY LACOMBE,
United States Circuit Judge.

NICOLL, ANABLE & LINDSAY,
Attorneys for Petitioner and Appellant.

(Endorsed :) United States circuit court, southern district of New York.—In the matter of the application of William H. McAlister, for writ of *habeas corpus*.—William H. McAlister appellant, *vs.* William Henkel, marshal in and for the southern dist. of New York, appellee.—Citation.—Nicoll, Anable & Lindsay, attorneys for petitioner, 31 Nassau St. New York.—Due service of the within citation is hereby admitted this 14th day of June, 1905. Henry L. Burnett, U. S. att'y. William Henkel, U. S. marshal.—U. S. circuit court, southern district New York, Filed Jun-14, 1905, John A. Shields, clerk.

81 UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to eighty inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled In the matter of the application of William H. McAlister for writ of *habeas corpus*. William H. McAlister, appellant *vs.* William Henkel, marshal in and for the southern district of New York, appellee as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 10th day of July in the year of our Lord one thousand nine hundred and five and of the Independence of the said United States the one hundred and thirtieth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, Clerk.

[Endorsed:] United States Supreme Court. William H. McAlister appellant *vs.* William Henkel, marshal in and for the southern district of New York appellee Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 19,843. S. New York C. C. U. S. Term No. 341. William H. McAlister, appellant, *vs.* William Henkel, United States marshal in and for the southern district of New York. Filed July 13th, 1905. File No. 19,843.

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 340.

EDWIN F. HALE,
Appellant,

AGAINST

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

BRIEF FOR
APPELLANT.

Statement of the Case.

This is an appeal from a final order of the United States Circuit Court for the Southern District of New York, entered June 10, 1905, dismissing a writ of *habeas corpus* sued out by the appellant and remanding him to the custody of the respondent (Rec., 38, 35), under a commitment issued, as alleged in the petition for the writ of *habeas corpus* (Rec., 2), and as conceded by the return (Rec., 23), under the following circumstances:

On May 2, 1905, the appellant, a director and the secretary and treasurer of the MacAndrews & Forbes Company, a New Jersey corporation, pre-

sented himself before the Grand Jury for the Southern District of New York, in obedience to what purported to be a writ of *subpoena duces tecum* issued out of the Circuit Court for that District April 28, 1905, under the seal of the Court, signed by the Clerk, and bearing *teste* of the Chief Justice of the United States, commanding him to lay aside all business and excuses, and appear and attend before that body

“ to testify and give evidence in a certain action now pending and undetermined in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States ” (Rec., 13-4),

and further commanding him to bring with him and produce (Rec., 14-5).

“(1.) All understandings, agreements, arrangements or contracts, whether evidenced by correspondence, memoranda, formal agreements and other writings, between MacAndrews & Forbes Company, and either of the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company, J. S. Young Company, J. D. Lewis, American Licorice Company, National Licorice Company, Meller & Rittenhouse, Stamford Manufacturing Company.

“(2.) All correspondence, by letter or telegram (including copies of all letters or telegrams sent by said MacAndrews & Forbes Company, or any of its officers, employees, agents or other representatives) between MacAndrews & Forbes Company and the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company: J. S. Young Company, J. D. Lewis, American Licorice Company, National Licorice Company, Meller & Rittenhouse, Stamford Manufacturing Company.

"(3.) All reports made, or accounts rendered, to MacAndrews & Forbes Company, by the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company: J. S. Young Company, J. D. Lewis, American Licorice Company, National Licorice Company, Meller & Rittenhouse, Stamford Manufacturing Company.

"(4) Any agreement or agreements, contract or contracts, arrangement or arrangements (whether evidenced by correspondence, telegrams, memoranda or formal written instrument) between MacAndrews & Forbes Company and the Amsterdam Supply Company, or the American Tobacco Company, or the Continental Tobacco Company or Consolidated Tobacco Company, from the date of the organization of the said MacAndrews & Forbes Company.

"(5.) Any and all letters received by the MacAndrews & Forbes Company, since the date of its organization, from any of the following named persons, firms or companies: Strater Brothers, Louisville, Kentucky; Monarch Tobacco Works, Louisville, Kentucky; H. N. Martin Tobacco Company, Louisville; Day and Night Tobacco Company, Cincinnati, Ohio; E. O. Eshelby & Company, Cincinnati, Ohio; Frischmuth Brothers & Company, Philadelphia, Pa.; Daniel Scotten Tobacco Company, Detroit, Michigan; R. A. Patterson & Company, Richmond, Virginia; Larus & Brother Company, Richmond, Virginia; United States Tobacco Company, Richmond, Virginia; P. Lorillard Company, Jersey City, New Jersey; R. J. Reynolds & Company, Winston, North Carolina; P. H. Mayo Company, Richmond, Virginia; and, also, copies of all letters and telegrams sent by the MacAndrews & Forbes Company, since the date of its organization, to either of the said persons, firms or companies; and all contracts agreements or arrangements between the said MacAndrews & Forbes Company and any of the said persons, firms or companies, whether such agreements, contracts or arrangements are evidenced by correspondence, telegrams, memoranda or

written instruments, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises."

The subpoena gave the appellant notice that for a failure to attend, he would be "deemed guilty of a contempt of Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit TWO HUNDRED AND FIFTY DOLLARS in addition thereto" (Rec., 15).

Before being sworn the appellant asked to be advised of the nature and purpose of the investigation in which he had been summoned before the Grand Jury, whether it was under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the Grand Jury had any lawful right or authority to make the inquiry, and whether there was anything lawfully pending before that body upon which witnesses might be summoned, sworn and examined; and he also asked that he be furnished with a copy of the complaint, information or proposed bill of indictment, if any, upon which the Grand Jury was acting, in order that he might know concerning what transactions, matters or things he was called upon to testify or produce evidence. He said his subpoena required him to attend and testify and give evidence in "a certain action now pending and undetermined in the Circuit Court of the United States for the Southern District of New York between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States," and to produce various papers and documents; that he was informed that there was no action then pending in the Circuit Court between the Government and the corporations named, and that the vague and general description of the papers and documents led him to suppose that the Grand Jury was investigating no

specific charge against any one; and that if that was the fact, his counsel advised him that he ought not to obey the summons or submit to examination (Rec., 20).

Without answering the appellant's inquiry, one of the three Assistant United States Attorneys who were in attendance before the Grand Jury proceeded to interrogate him as to his name, residence and business. Having given his name and residence, and stated (Rec., 10) that he was the secretary and treasurer of the MacAndrews & Forbes Company, he was asked:

(1.) "That company is engaged in what business" (Rec., 10)?

To which he responded:

"I shall have to respectfully decline to answer further questions on the grounds, first, that there is no legal warrant or authority for my examination as a witness, and, second, that any answers may tend to criminate me" (Rec., 11).

He was thereupon asked the following questions (Rec., 11-2):

(2.) "What business were you in before you came to New York City?"

(3.) "Who is the President of the MacAndrews & Forbes Company?"

(4.) "What is the business of the MacAndrews & Forbes Company?"

(5.) "Where is their office?"

(6.) "And where is the office of the American Tobacco Company?"

(7.) "Who is the President of the American Tobacco Company?"

(8.) "Is there any agreement, or understanding, or arrangement, between the American Tobacco Company and MacAndrews & Forbes Company in relation to the trade or business in licorice, licorice paste or licorice mass, affecting the business between several States of the United States?"

(9.) "Do you know a company by the name of J. S. Young Co.?"

(10.) "Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?"

(11.) "Are you in the employment of the American Tobacco Company?"

He refused to answer all of these questions for the reasons above given, and stated that he declined to give further testimony for the same reasons, which, at the request of the Assistant United States Attorney, he repeated at length (Rec., 11).

Being asked whether he had produced the papers called for by the *subpœna duces tecum* he said that he had not,

"first, because it would have been a physical impossibility for me to have gotten them together within the time allowed, and, second, because I am advised by counsel that upon the facts as they now appear I am under no legal obligation to produce them, and, third, because they may tend to criminate me" (Rec., 11).

After some discussion as to the form and contents of the subpœna, and after the appellant had again said that he had not produced the papers "for the reasons previously stated," the Assistant United States Attorney addressed the appellant as follows (Rec., 13):

"Mr. Hale, I desire to advise you that this is a proceeding under the so-called Sherman Act, being an act to protect trade and commerce against unlawful restraints and monopolies, 26 Statutes, 209, 1 Supplement Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and particularly Chapter 755 of the Laws of 1903, approved February 25, 1903; and I also advise you that under the last named act no person shall be prosecuted or be subjected to any penalty or forfeiture for or

on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under the said act, that is, referring to the Sherman Act, under which this prosecution is brought; provided, however, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose not to proceed to prosecute you, or subject you to any penalty or forfeiture on account of anything that you are now asked to testify to, or produce evidence, documentary or otherwise, regarding it, in this proceeding, and I offer you and assure to you immunity and exemption for any such testimony that you may give. Do you still decline to answer the questions which have been put to you?"

The appellant responded:

"I must respectfully decline to answer.

"Q. You decline to answer all the questions that have been put to you on the grounds which you have stated, in relation to each of the questions? A. I do" (Rec., 13).

At this point the hearing was adjourned to May 5th, when the Grand Jury filed in open court a presentment or report charging the appellant with contempt of court in having failed and refused to produce before the Grand Jury the "various books, letters, memoranda and other writings, all of which are specifically enumerated and set forth in the said subpoena," and also in having failed and refused to answer the eleven questions above set forth (Rec., 8-9).

This presentment or report informed the Court that the appellant had been commanded by the subpoena to testify and to produce the "various books," &c., "in a certain matter then under investigation before the said Grand Jury," that "the said books," &c., "are material to an in-

"vestigation being conducted before the said "Grand Jury," that the questions which the appellant had refused to answer were "pertinent to "the said investigation" ("and proceeding") (Rec., 10) "and material thereto," and that the Assistant United States Attorney who had propounded them was "in attendance before the said Grand "Jury, and was conducting the said investigation "in behalf of the said Grand Jury" (Rec., 8).

It further informed the Court of the manner in which the Assistant United States Attorney had, in addressing the appellant in the Grand Jury room, characterized "the proceeding then pending before" that body, and how he had offered and assured the appellant immunity and exemption for any testimony he might give (Rec., 9).

On the facts thus set forth the Grand Jury asked that such proceedings be had as were, "in the "premises, in accordance with law" (Rec., 10).

The appellant being present in court when the presentment or report was submitted the Court, on motion of the Assistant United States Attorney, directed him

"to answer the questions as propounded by the Grand Jury, and forthwith produce the papers" (Rec., 18).

The Grand Jury thereupon repaired to the Grand Jury room (Rec., 19) and the appellant was again called before them. The questions were again put to him and he repeated his refusal to answer them, giving his reasons as before. In like manner and upon the grounds previously stated by him he refused to produce the books and papers called for by the subpoena *duces tecum* (Rec., 19-21). He was again told that the "proceeding" was under the "so-called Sherman Act," &c., and assured of immunity, notwithstanding which he persisted in his refusal, explaining that he did so with the utmost respect for the Grand Jury and the judgment of the Court (Rec., 22).

A second report or presentment setting forth what occurred on this occasion was submitted to the Court by the Grand Jury on May 8th (Rec., 15-17), at which time, the appellant being again present, the order was made adjudging him guilty of contempt, fining him five dollars, and directing his commitment to the custody of the Marshal until he complied with the order of the Court "by answering said questions "and producing said papers and documents, or is "otherwise discharged by due process of law" (Exhibit "B," Rec., 7).

The purpose of the writ of *habeas corpus* was to determine the legality of the appellant's restraint under the commitment issued May 11, 1905, pursuant to this order, by virtue of which the appellant was taken into custody by the Marshal (Exhibit "A," Rec., 5), and this appeal is from the final order dismissing the writ of *habeas corpus* and remanding the appellant to the custody of the Marshal.

Specification of Error.

The appellant contends that the Circuit Court erred (1) in dismissing the writ; (2) in holding that he was lawfully held in custody under the commitment (1st and 2d Assignments of Error, p. 40). He maintains that his imprisonment, restraint and detention were and are without lawful authority, and that the Circuit Court erred in dismissing the writ of *habeas corpus* for the reasons set forth in the petition (pp. 1-4, *a* to *m*). Of the other errors specifically assigned (pp. 40-42) the appellant will upon this appeal rely particularly upon those which, for convenience, may be summarized as follows:

(a.) The presentments or reports of the Grand Jury failed to set forth any facts upon which the Circuit Court could lawfully entertain any charge or charges of contempt against the petitioner, or act

or proceed in any manner in the premises (3d Assignment of Error, p. 40).

(b.) When the petitioner attended before the Grand Jury there was no "cause" or "action" of any kind whatever pending in the Court in which he could be lawfully required to testify or give evidence (4th *Id.*).

(c.) The Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the so-called "investigation," "proceeding" or "matter" thus described in the reports or presentments, the powers of a Federal Grand Jury being limited under the Constitution to the investigation of specific charges against particular persons, and it being apparent that there was under investigation by the Grand Jury at the time the petitioner attended before that body no specific charge against any particular person (5th *Id.*).

(d.) Section 1 of the Act of February 25, 1903, does not give the petitioner immunity from prosecution, for or on account of the transactions, matters or things concerning which he was directed to testify and produce evidence before the Grand Jury, the investigation herein before that body not being a "proceeding, suit or prosecution" under either of the Acts referred to in the Act of February 25, 1903; consequently the petitioner was within the legitimate exercise of his right under the 5th Amendment of the Constitution, when he refused to testify or produce evidence before the Grand Jury on the ground that by so doing he might have criminated himself (6th, 7th and 8th *Id.*).

(e.) The Act of February 25, 1903, is unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power

to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, thus infringing upon the provision of Article X. of the Amendments to the Constitution of the United States that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people (10th, 11th, 12th and 13th *Id.*).

(f.) The order of May 5th, directing the petitioner to forthwith produce the papers called for by the subpoena *duces tecum* was made in violation of the Fourth Amendment. It was, in effect, a warrant to search for and seize the papers mentioned in the subpoena *duces tecum*. It was not issued upon probable cause, or supported by oath or affirmation, and failed to particularly describe the place to be searched or the things to be seized (15th, 16th and 17th *Id.*, p. 42).

(g.) The papers mentioned in the subpoena *duces tecum* being the property of the McAndrews & Forbes Company and in the petitioner's custody solely by reason of his official relations toward that company, the compulsion of said subpoena, and of the order that he produce such papers would, if effective, have amounted to an unreasonable search for and seizure of the papers and effects of the corporation, which it was the petitioner's duty as such officer and custodian to protect by lawful means, as he is now doing (18th and 19th *Id.*).

(h.) The production of the said papers being required of the petitioner in his capacity of officer and director of the said corporation, and the order so requiring not being issued upon probable cause, or supported by oath or affirmation, and failing to "particularly describe the place to be searched, or the things to be seized," its issuance constituted a

violation of the said Fourth Amendment (20th and 21st *Id.*).

ARGUMENT.

FIRST POINT.

The presentments or reports of the Grand Jury set forth no facts authorizing the Circuit Court to entertain any charge against the appellant, or to act or proceed in any manner in the premises.

Unless the Grand Jury in prosecuting the investigation referred to in its two reports to the court was acting within the scope of its jurisdiction, the court was without authority to punish the witness for his supposed contumacy; refusing to answer questions, and all of its acts and proceedings in the premises were without authority and void.

If this proposition needs any support from authority the following cases are cited:

People v. Cassels, 5 Hill, 164, where a witness committed for refusing to answer questions relating to a criminal complaint before a justice of the peace was discharged on *habeas corpus* on the ground that the justice in inquiring into such criminal complaint was acting outside of his jurisdiction, the court saying, by Bronson, J.:

“Here neither the crime nor the offender was in Chenango, and the Justice was without the shadow of authority in attempting to inquire into the matter. The whole proceeding was *coram non judice*.”

Ex parte Fisk, 113 U. S., 713, where a witness committed for contempt in refusing to submit to an

examination before trial ordered by the United States Circuit Court for the Southern District of New York was released on *habeas corpus* on the ground that the Court was without jurisdiction to make such an order. The Court said, per Miller, J.:

"When, however, a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."

Cooley on Constitutional Limitations (7th Ed.), page 575, (note):

"Any action taken by a court in the absence of the facts upon which its jurisdiction rightfully rests is void, and may be collaterally impeached,"

citing

Scott v. McNeal, 154 U. S., 34.

That the witness can refuse to answer questions or produce papers if the body subpoenaing him has no jurisdiction in the premises was assumed in Counselman's case, 142 U. S., 547, and in Brimson's case, 151 U. S., 447, and was expressly decided in *Kilbourn v. Thompson*, 103 U. S., 168, and with reference to a Grand Jury investigation, in *Lester's case* (*post*) and *Hartranft's appeal* (*post*).

It is doubtless true that the Grand Jury will ordinarily be presumed to have followed the "usual" methods of procedure. But such presumption only arises "in the absence of any averment or suggestions to the contrary."

United States v. Terry, 39 Fed. Rep., 355.

Here, so far from showing that the District Attorney had informed the Grand Jury of "the nature

of the charge," &c. "It is manifest from the facts recited in the presentment * * * that the investigation * * * was not based upon any specific charge," but was "directed to the discovery" of some undisclosed infraction of law, &c. (Rec., 27).

Since no presumptions are to be indulged in in favor of the jurisdiction of the grand jury or of the Court when they are against the liberty of the citizen, it follows that the appellant should have been discharged unless it appeared from the record before the Circuit Court that the grand jury was prosecuting an inquiry within the scope of its jurisdiction. No such fact appears.

The first presentment or report of the grand jury made May 5th refers to what was going on before the grand jury only as "a certain matter then under investigation before the grand jury," "an investition being conducted before the grand jury" (Rec. 8), "the proceeding before the Grand Jury" (Rec., 9), and "the said investigation and proceeding" (Rec., 10); and shows that the appellant was "duly advised" by the Assistant United States Attorney that "the proceeding then pending before the said Grand Jury was a proceeding under the so called Sherman Act" (Rec., 9). The minutes returned with the report also show that the Assistant United States Attorney, in advising the witness, referred to the "proceeding" before the Grand Jury as "this prosecution" (Rec., 13).

The subpoena annexed to this report had called upon the appellant to testify before the Grand Jury, &c., "in a certain action now pending undetermined * * * between the United States of America and the two corporations before named" (Rec., 13-14), and the minutes, a copy of which accompany the report, were entitled, "Before the United States Grand Jury. The United States vs. American Tobacco Company and McAndrews & Forbes Company" (Rec., 10).

The presentment or report of May 8th contains no additional information on the subject (Rec., 15-19).

What, then, was the matter, subject or thing which the Grand Jury was investigating? What was the "proceeding" the Assistant United States Attorney was conducting "in behalf of the said Grand Jury?" What was there before the Court from which it could *see and determine* that it was a matter, subject or thing legitimately within the cognizance of the Grand Jury, or to which its functions extended?

The powers and duties of a Federal Grand Jury are concededly limited to inquiries into crimes and offenses against the federal laws committed within the territorial jurisdiction of the court in which it is empaneled. We shall maintain, in a subsequent point, that its authority to summon and examine witnesses begins only after a definite charge against some particular person or persons has been made. But waiving that point for the present, and assuming the existence of the broadest "inquisitorial" power in the Grand Jury, we submit there is absolutely nothing in the record indicating or even remotely suggesting that the Grand Jury was engaged in investigating even a suspected violation of law.

To what, then, were the questions which the petitioner refused to answer pertinent? And to what were the "various" books, letters, memoranda and other writings material? What was there, in short, before the Circuit Court from which it could see and determine that what was demanded of the petitioner by way of oral testimony or documentary proof was relevant to anything in respect to which the Grand Jury had authority to inquire?

The truth is the court made no finding in this connection. Both of the Grand Jury reports asserted the relevancy of the evidence sought for,

but the order of the court (pp. 7, 18) and the commitment (pp. 5-6) are destitute of any reference to this fact, upon the existence of which the soundness of the decision below wholly depended.

SECOND POINT.

There was no judicial matter pending in the Circuit Court at the time the appellant was required to attend before the Grand Jury, or when the orders of May 5th and May 8th were made, in or upon which he could lawfully be required to testify or produce evidence before the Grand Jury.

Notwithstanding the language of the *subpœna*, which commanded the petitioner to testify and produce papers and documents "in a certain action," the requirement that the petitioner appear before the Grand Jury necessarily shows that there was in fact no *action* pending, for there can be no action, or prosecution, nor even a criminal proceeding, until after some one has been formally accused of acts constituting a criminal offense, by indictment duly returned by the Grand Jury, or at least by information lodged before a magistrate.

Post v. United States, 161 U. S., 583, 587.

If, as is conclusively established by the record, there was no particular *charge* against the two corporations named in the *subpœna duces tecum*, or either of them, under investigation by the Grand Jury when the petitioner was called upon to testify, and the Grand Jury were merely engaged in an effort to find out *whether* they, or either of them, had or had *not* transgressed the "so-called Sherman Act," it is clear the Grand Jury were not in the exercise of any *judicial* function.

The courts of the United States can exercise none but judicial power. This power extends to the "cases" and "controversies" mentioned in Article III. of the Constitution. It extends no further. Unless there be a "case" or a "controversy," within the meaning of the Constitution, the courts are without jurisdiction or authority to act.

An *ex parte* inquisitorial investigation, based upon mere suspicion or speculation, without any complaint or charge, and that may and presumably would be without result, is not a "case" or "controversy" within the meaning of the Constitution; and no court has any power or right to lend its aid or assistance to such a matter.

Pacific Railway Commission v. Stanford, 32 Fed. Rep., 241.

Kilbourn v. Thompson, 103 U. S., 168.

Interstate Commerce Commission v. Brimson, 154 U. S., 447.

THIRD POINT.

The Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation upon which the petitioner was required to attend before that body; consequently its requirement that he should testify and produce documentary evidence, and the orders of the court, based upon his refusal so to do, were coram non judice and void.

The general considerations already advanced indicate the fundamental principle upon which the present point rests, namely, that the function of a

Grand Jury is certain and definite, and is clearly limited to the examination by the Grand Jury of specific crimes *duly alleged* to have been committed by particular individuals within the jurisdiction of the court of which it forms a part, and properly laid before it, in order that it may decide, upon the evidence submitted to it, whether or not the accused is or is not *prima facie* guilty of the acts so charged.

(a.) By the common law the powers of Grand Juries were restricted to the presentment to the court of accusations of two sorts, viz.: indictments returned after the examination of witnesses, and presentments made upon the knowledge or observation of the grand jurors themselves.

The former was a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by the Grand Jury.

To this end, says Blackstone, "the sheriff of every county is bound to return to every session of the peace, and every commission of Oyer and Terminer, and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord, the king, shall then and there be commanded. * * * This Grand Jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. *They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; * * ** When the Grand Jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, 'ignoramus;' or, we know nothing of it; intimating that though the facts might possibly be true, that truth did not appear to them; but now, they assert in English more absolutely, 'not a true bill;' or (which is the better way) 'not found;' and then the party is discharged with-

out further answer. * * * If they are satisfied of the truth of the accusation, they then indorse upon it, 'a true bill;' anciently '*billa vera*,' the indictment is then said to be found, and the party stands indicted."

Bl. Com., Book IV., Ch. 23.

A grand jury presentment, as distinguished from an indictment, was "the notice, taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it."

Ibid. See also *Chitty*, Vol. I., p. 162.

The form of the grand juror's oath was as follows:

"*Oath of the Foreman*: Sir, you as foreman of this grand inquest, for our sovereign lady the queen and the body of this county, shall diligently inquire, and true presentment make, of all such matters and things as *shall be given to you in charge*, or shall otherwise come to your knowledge, touching this present service; the queen's counsel, your fellows, and your own, you shall keep secret; you shall present no one through envy, hatred, or malice, neither shall you leave any one unpresented through fear, favor, affection, gain, reward, or hope thereof, but you shall present all things truly and indifferently as they shall come to your knowledge, according to the best of your understanding. So help you God."

The other jurymen were thus sworn:

"The same oath that your foreman hath taken on his part, you shall well and truly

keep, and observe on your respective parts.
So help you God."

2 Gude, Crown Pract., 583.*

The Grand Jury being thus sworn, the bill was preferred before them.

"Previous to this the prosecutor must cause it to be properly prepared and engrossed on parchment."

Chitty, Vol I., p. 316.

Each witness was sworn that "the evidence he shall give to the grand inquest *upon the bill of indictment against the defendant*, shall be the truth, etc."

Ibid, 322.

"At common law," says ARCHBOLD, "it was necessary *after the indictment was engrossed* that the crier or some officer of the court (R. v. Tew, Dears., 429; 24 L. J. [M. C.], 62) should administer the oath to the witnesses in open court, and *then* the indictment was laid by the proper officer before the Grand Jury."

Cr. Pl., etc., (22d Ed.) 89-90.

As indicating the necessity of submitting a duly engrossed bill to the Grand Jury before that

*And see *Rex v. Shaftsbury*, 8 Howell St. Tr., 759; 3 Harg. St. Tr., 417, where it is given in the following form:

"You shall diligently inquire and true presentments make of all such matters, articles and things as shall be given you in charge, as of all other matters and things as shall come to your own knowledge touching this present service; the King's counsel, your fellows and your own you shall keep secret; you shall present no person for hatred or malice, neither shall you leave any one unpresented for fear, favor or affection, for lucre or gain or any hopes thereof; but in all things you shall present the truth, the whole truth and nothing but the truth to the best of your knowledge. So help you God."

In the Book of Oaths, p. 206 (quoted in a note to How. St. Trials, 772), the oath as formerly used is given: "You shall truly enquire and true presentment make of all such things as you are charged with—all on the queene's behalf, the queene's counsell your owne and your fellowes' you shall well and truly keepe; and in all other things the truth present: so help you God and by the contents of this booke."

body could properly enter upon an inquiry into the crime therein charged it is interesting to refer to the common law forms of indictments for offenses in connection with Grand Jury proceedings, all of which, without exception, recite the presentation of the bill of indictment, the contents of the bill, etc.

"See *Davis*, *Prec. Ind.*, &c. (form for persuading a witness "not to give evidence against a person charged with an offense before the Grand Jury), p. 219; *Reg v. Hughes*, 1 C. & K., 519 (perjury before a Grand Jury*); *Wharton's Prec.* (1st Ed.), 328.

That at common law grand juries had no power to inquire *whether* crimes had been committed or to indulge in any of the inquisitorial ventures which are in these times so popular with public prosecutors must be assumed in the absence of any recorded case even suggesting that power.

(b.) The Grand Jury was continued as a part of our federal institutions by the Fifth Amendment to the Constitution, which went into force December 15, 1791, viz.:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a *Grand Jury*, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger."

The powers and duties of the grand juries thus ingrafted into our system are nowhere defined, either by the Constitution or by any federal statute. It is clear, therefore, that they are only such as were possessed by grand juries at the common law, namely, of considering and

* "That heretofore * * * a certain bill of indictment against T. H. * * * was then and there, in due form of law, exhibited to (naming the grand jurors) * * * sworn and charged to inquire," &c., "which said bill of indictment was then and there as followeth, that is to say (setting out the indictment *verbatim* * * *)," &c.

acting upon indictments previously framed and laid before them by a known prosecutor, and of presenting facts within their own knowledge.

A recognition of the soundness of this proposition is found in the utterance of Judge IREDELL (U. S. Circuit Court, Virginia, November, 1795) in *U. S. v. Mundell*, 8 Va. (6 Call), 245, 247, who said:

“And it is incident to the nature and constitution of the Grand Jury to indict when they receive information of a crime. The latter was said to be a presentment merely, and not an indictment; but that is not strictly correct, for the difference between them is this: If the Grand Jury present of their own knowledge, it is a presentment only; but if on the knowledge of others, it is an indictment.”

(c.) It will not be pretended that there is any Federal statute authorizing a grand jury to inquire into matters called to their attention by the Court or prosecuting attorney, where there is no specific charge against one or more individuals. Nor could any such statute be enacted without infringing the spirit of the Constitution, which confines the powers of the Federal courts to the consideration of judicial matters exclusively.

(d.) The present day notion that a Grand Jury has practically unlimited inquisitorial power rests, without doubt, upon various loose and ill-considered utterances in reported cases, in consequence of which we find in our text-books such expressions as the following:

“Although it has been sometimes asserted that at common law a Grand Jury was charged especially with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offences (per Avery, *J.*, in *State v. Witcox*, 104 N. Car., 847. See also to the effect that a Grand Jury has inquisitorial powers, *Ward v. State*, 2 Mo., 120, 22 Am.

Dec., 449, and a dictum by Church, *C. J.*, in *State v. Wolcott*, 21 Conn., 271), according to the weight of authority the power of the Grand Jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body, is ordinarily limited to cases in which individuals have been charged with specific crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record who may, if he swear falsely, be indicted for perjury, or to cases which are called to its attention by the Court or the prosecuting attorney, and it has no power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender."

17 Am. and Eng. Enc. L. (2d Ed.), 1279, citing numerous cases.

(e.) An examination of the cases will show not only that no Court in this country has ever *decided* that there can be a legitimate Grand Jury inquiry without a previous *charge* of crime, but that, except in the single State of Tennessee, where there is legislative authority for it in respect to certain classes of offenses, the theory of general inquisitorial power in a grand jury is absolutely repudiated.

Thus, in *In re Lester*, 77 Georgia, 143 (Oct. Term, 1886), the Supreme Court of Georgia, after indulging in general observations which might, standing alone, justify the modern idea, immediately proceeds to limit these observations as follows:

"Anything they can find out by their own inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to disclose to them who may have violated the public laws, and the names of persons by whom such infractions can be established; in short, to make every man a spy upon the conduct of his neighbors and associates, and compel him to violate the confi-

dence implied in holding social intercourse with his fellows by forcing him to become a public informer. Such an exercise of power would be in derogation of general principles essential to the enjoyment of rights regarded as sacred and paramount in the intercourse between man and man; and these rights have been carefully guarded, not only by the spirit of our law, but by its express enactments. *The grand jury can find no bill nor make any presentment, except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specific offense, to speak the truth, the whole truth, and nothing but the truth, &c."*

In *Lewis v. Commissioners*, 74 N. C., 194 Jan. Term, 1876), BYNUM, J., after observing that "there is no authority of law to summon and send (witnesses) before the Grand Jury, upon mere matters of inquiry, a power which, if allowed, is capable of the grossest and most oppressive abuse, coupled with great temptations to abuse it," continued:

"A prosecuting officer has no right, of his own motion, or upon that of an officious, if not an intermeddling and malicious prosecutor, to send witnesses to the Grand Jury room, merely to be interrogated *whether there has been any violation of the criminal law, within their knowledge*. The law denounces such inquisitorial powers, which may be carried to the extent of penetrating every household, and exposing the domestic privacy of every family. The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition. * * *

As a general proposition, it is not advisable for a prosecuting officer to send a bill to the Grand Jury without endorsing upon it the name of a prosecutor, except upon presentments, or when the parties have been bound over by committing magistrates, or where the solicitor is directed by statute to send bills for particular offenses."

In Missouri it was held in an old case that when the Grand Jury have *probable cause* to believe that

some offense has been committed they may send for and examine persons who may, in their opinion, be most likely to possess evidence relating to these matters. But plainly recognizing that there must be an allegation of a definite crime and an accused person before the Grand Jury could act, the Court said:

"Now, if it should ever happen that a Grand Jury should determine to have summoned every person in the county, with a view to make the experiment if perchance they *might find out* some offense, I have no doubt that it would be the duty of the Court to withhold its process and stop such a course. This would be an abuse of power."

Ward v. State, 2 Mo., 120.

In respect to the cases that may be cited by the learned counsel for the respondents, including the *obiter* of Judge Thomas in the Kimball case (117 Fed. Rep., 156), and the work of Thompson and Merriam on Juries, where it is said, "the expressions which are quoted * * * bristle with evidence of the inquisitorial power of the Grand Jury," &c., it is enough to say that in no case that can be found in the books, where the point has been presented, directly or indirectly, has there been an intimation that a Grand Jury could prosecute an investigation in the absence of a specific charge of crime directed against a particular person or persons, except in certain Pennsylvania decisions where the courts have held that under the instructions of the Court attention of grand juries may be drawn to matters of general public import, such as "great riots that shake the social fabric, public pestilences," &c.

Case of Lloyd & Carpenter, Pa. L. J., 47.

Matter of Citizen's Ass'n., 8 Phil., 478.

Appeal of Hartranft, 85 Pa. St., 433.

Com. v. Green, 126 Pa. St., 531.

(f.) The fact that there is no constitutional, statutory or judicial authority for the institution of a "general" Grand Jury investigation is in itself sufficient to show its illegality, for as was said by Lord Camden in the celebrated case of *Entick v. Carrington*, 19 How. St. Tr., 1030, 1066, where the practice of issuing general warrants, in vogue for more than a hundred years, was declared illegal, notwithstanding its antiquity:

"If it is law it will be found in our books. If it is not to be found there, it is not law."

(g.) In Tennessee the Legislature has by special enactments given express inquisitorial power to grand juries with respect to certain crimes.

In *Harrison v. State*, 4 Coldwell (44 Tenn.), 195 it was held that such statutes are in derogation of the common law, and can not be extended beyond their express terms.

In *State v. Adams*, 2 Lea, 647 an indictment was quashed because the Grand Jury sent for witnesses on suspicion to investigate as to whether a certain crime had been committed, with reference to which crime the statute did not confer inquisitorial power on the Grand Jury.

In *State v. Lee*, 3 Pickle, 114, it was said:

"The inquisitorial power of the Grand Jury was unknown to the common law, and it exists in this State with respect to any given offense only when expressly conferred by statute."

See also, *Glenn v. State*, 1 Swan, 19.

(h.) Even in Maryland, where it has been held that "however restricted the functions of Grand Juries may be elsewhere," in that State they have "plenary inquisitorial powers, and may lawfully themselves

and upon their own motion originate *charges* against offenders, though no preliminary proceedings have been had before a magistrate, and though neither the Court nor the State's attorney has laid the matter before them," it has never been suggested that Grand Juries may indulge in a fishing expedition (which is certainly not a *charge*) in order to find out if there is really any *basis for a charge*.

Blaney v. State, 74 Maryland, 153, 156.

(i.) The growth during recent years of the notion that Grand Juries may exercise "inquisitorial" powers has without doubt been occasioned by the gradual abandonment of the strict common law rule which required the framing and formal preferring of bills of indictment to the Grand Jury before the calling of witnesses in support of them, and the adoption of the easier and more convenient practice of preparing the bill after the jury had heard the evidence and voted to indict. The result has been that prosecutors have sometimes forgotten that in every case the indictment is supposed to be before the Grand Jury, and that, in theory of law, it has been actually prepared and presented to them as the basis of their inquiry.

Frisbie v. United States, 157 U. S., 160.

People ex rel. Hackley v. Kelly, 24 N. Y., 74.

People ex rel. Pickard v. Sheriff, 11 N. Y. Civ. Proc., 172, 185.

O'Hair v. People, 32 Ill. App., 277.

Webster's Case, 5 Greenleaf, 432.

In all of these cases the courts, so far from suggesting that a Grand Jury may prosecute an inquiry in the absence of a specific charge against one or more individuals, clearly indicate that they are limited to the examinations of a particular accusation which, when proven, can be reduced to the form of an indictment.

In the *Frisbie* case this Court said (per BREWER, J.):

"But in this country the common practice is for the Grand Jury to investigate any *alleged* crime, no matter how, or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the *formal charge or indictment*. Thus they return into court only those *accusations* which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indictment loses its essential character."

In the *Hackley* case the New York Court of Appeals said (per DENIO, J.):

"The criticism of the appellant's counsel is that the examination of a witness before a grand jury is not a proceeding upon an indictment, and so not within the statute. In one sense it is not. But by the theory of proceedings in criminal cases *the indictment is supposed to be prepared and taken before the Grand Jury* by the counsel prosecuting for the State, and the evidence is then given in respect to the offense charged in it."

In the *Pickard* case it was said:

"The theory of the law is that a bill of indictment is prepared by the public prosecutor and presented to the Grand Jury *to pass upon it*, after hearing the evidence *in support of the bill*. The jury either find the indictment 'a true bill,' or ignore it and find it 'not a true bill' (4 Blackstone Com., 205). The practice, however, is for the District Attorney to inform the jury *of the charge to be investigated*, and, if a bill is found, to prepare an indictment such as the jury conclude to present."

In *Webster's case* the Supreme Court of Maine, after alluding to the English practice of preferring

indictments before the examination of witnesses, said (per MELLE, C. J.):

"In Massachusetts and this State the customary practice is, *after a complaint is made to the Grand Jury*, for them to hear the evidence in support of it; and, if they agree to find a bill, an indictment is thereupon drawn by the Attorney-General or County Attorney in legal form against the party accused, describing the offense of which they accuse him * * * It is believed, and seems to have been admitted, that such has been the uniform practice from time immemorial. In England, we presume, an indictment must be found and certified in the manner before mentioned, or it would not be sanctioned as legal; because such is their settled practice, and such their common law on the subject."

(j.) A plain intimation that a Grand Jury investigation should be based upon a specific charge in the form of a bill duly preferred to the Grand Jury is contained in Mr. Justice Gray's opinion in *Post v. United States*, 161 U. S., 585, 587:

"Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at least, by complaint before a magistrate (*Virginia v. Paul*, 148 U. S., 107, 119 121; *Rev v. Phillips*, Russ. & Ry., 369; *Regina v. Parke, Leigh & Cave*, 459; s. c., 9 Cox Crim. Cas., 475. *The submission of a bill of indictment by the attorney for the Government to the Grand Jury, and the examination of witnesses before them*, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the Grand Jury in determining whether such proceedings shall be commenced; the Grand Jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court."

See also *Beavers v. Henkel*, 194 U. S., 73, 84, where Mr. Justice Brewer said:

"The Grand Jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe *the defendant guilty of the offense charged.*"

(*l.*) But even though a grand jury may send for witnesses before an indictment has been actually framed and laid before them, still it is perfectly certain that there must *at least* be pending before them some *specific charge* directed against a particular person or persons.

The soundness of this proposition was assumed by this Court in the case of *Counselman v. Hitchcock*, 142 U. S., 547, where BLATCHFORD, J., said (p. 561):

"It is contended by the appellant that the Grand Jury of the District Court was not in the exercise of its proper and legitimate authority in prosecuting the investigations specifically set out in its two reports to the District Court; that those reports could not be made the foundation of any judicial action by the Court; that the Interstate Commerce Commission was specially invested by the statute with the authority to investigate violations of the Act and charged with that duty; and that no duty in that respect was imposed upon the Grand Jury until specific charges had been made. But in the view we take of this case, we do not find it necessary to intimate any opinion as to that question in any of its branches, or as to the question *whether the reports of the Grand Jury*, in stating that they were engaged in investigating and inquiring into *certain alleged violations* of the Acts of 1887 and 1889 *by the officers and agents* of three specified railway and railroad companies, and the officers and agents of various other railroad companies having lines of road in the district (there being no other showing in the record as to what they were investigating and inquiring into), *are or are not consistent with the fact that they were investigating specific charges against par-*

ticular persons; because we are of the opinion that upon another ground the judgment of the court below must be reversed."

(1.) In *United States v. Kilpatrick*, 16 Fed. Rep., 765, Dick, J., said:

"In State courts, where common law jurisdiction over offenses is exercised, the powers and duties of grand juries are more extensive and responsible than in Federal courts, which have cognizance only of offenses defined and declared by acts of Congress; and there are special officers and agents appointed to make preliminary investigations of offenses against national laws. State grand juries have a general supervision over peace, good order, and well being of society, and may make presentments of offenses which are within their own personal knowledge and observation, or such as are of public notoriety and injurious to the entire community; but they cannot make inquisitions into the general conduct and private business of their fellow-citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors. The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition."

Judge Dick quoted with approval from Justice Field's charge (15 Am. L. Jour., 259) to the effect that grand jurors are limited in their inquiries to such *charges* as are called to their attention *by the Court*, or submitted to their consideration *by the District Attorney*; or such as may come to their knowledge in the course of their investigations of matter brought before them, or from their own observation; or such as may be disclosed by members of the body. And this is in which accordance with the views expressed by this Court in the Frisbie case (*supra*) that although it is unimportant, how or by whom it is suggested, there must nevertheless be an "*alleged crime*."

This rule was distinctly recognized in a compara-

tively recent case in the New York General Sessions, where Recorder Goff, in defining the powers of grand juries, said:

"Except in special cases specified by law their power to inquire is limited to crimes committed or triable in the county. In order for them to exercise that power it must be made to appear by complaint or information or knowledge acquired that there is reason to believe that a crime has been committed. They have not the power to institute or prosecute an inquiry *on chance or speculation that some crime may be discovered*. Such an inquisition based upon mere suspicion would be odious and oppressive, and would not be tolerated by our laws. There must be reason to believe that a crime of a specific character has been committed by a particular person whose name may be either known or unknown to the Grand Jury. * * * They have not the power to summon a witness and examine him upon matters that are wholly unconnected with or related to the subject of inquiry. The process of the Grand Jury can be used only for the purpose of aiding a lawful inquiry, and it must not be used for the purpose of oppression or harassment."

Matter of Morse, 18 N. Y. C. R., 312;
42 Misc., 664.

Judge Thomas' observations in the *Kimball* case, to the effect that the Grand Jury might institute an inquiry where no one was even suspected of a crime, were made in a case where the power of the Grand Jury to prosecute any kind of a general inquiry was not challenged; and the same is to be said of the other cases cited by the Government in the Court below.

(*m.*) Our system of law does not contemplate any inquiry into the commission of crime, except where some one is charged with it upon *allegations showing the existence of facts, which, if established by competent proof, constitute a violation of law.*

The possibilities of wrong and oppression under such a system as that contended for by the government in this case are beyond conception. The only safety lies in the application of those rules which deny the existence under our government of any merely *inquisitorial power* to hunt for crimes; and which declare that a grand jury is but a faculty to aid the criminal court in the discharge of its duties, and has no jurisdiction where the court itself has none.

As was said in *Lloyd v. Carpenter* (3 Pa. L. J., 188):

“It is important also in the consideration of this question to be borne in mind that the body so to be clothed with these extraordinary functions is perhaps the only one of our public agents that is totally irresponsible for official acts. When the official existence of a grand jury terminates they mingle again with the great mass of other citizens intangible for any of the unofficial acts, either by private action, public prosecution or legislative impeachments.”

“That the action of such a body should be kept within the powers clearly pertaining to it is a proposition self-evident; particularly where a doubtful authority is claimed the exercise of which has a direct tendency to deprive a citizen of any of the guarantees of his personal rights secured by the Constitution. * * * This limitation of authority we regard as alike fortunate for the citizen and the Grand Jury. It protects the citizen from the persecution and annoyance which private malice or personal animosity introduced into the Grand Jury might subject him to. And it conserves the dignity of the Grand Jury and the veneration with which they ought always to be regarded by making them *the umpire between the accuser and the accused, instead of assuming the office of the former.*”

Every word of this quotation is strong and pertinent to the present case. But particular attention

is due the last words quoted, to wit, that it is the high province of the Grand Jury to act as umpire between the accuser—the executive and administrative department of the government on the one hand—and the accused on the other. The Grand Jury, whose functions are distinctly and exclusively *judicial*—not inquisitorial—should be the conservators of the liberty of the citizen, and see to it that no citizen is put to the expense, inconvenience and odium of a public criminal prosecution unless the accuser—the department charged with the duty of securing and presenting the evidence upon which the accusation is based—has made out a *prima facie* case. According to this—the correct view of the functions of a Grand Jury—the Grand Jury is entitled to the respect and veneration of all citizens, whereas according to the views of the District-Attorney in this case it is more to be dreaded than the Spanish Inquisition.

When we keep in mind the really important point, viz., that inquisitorial power is not judicial power at all, there is no difficulty in seeing the vice of those views.

(n.) The *reason* why a Grand Jury does not possess, and *cannot*, under the Constitution of this State exercise, purely *inquisitorial* power, is that such power is in no sense a *judicial* one.

An inquiry for the purpose of determining *whether* a crime has been committed, and if so, who is guilty of it, is a matter for the executive or administrative branch of the government. Until it is ascertained that a crime *has* been committed, and that there is probable cause to believe that some particular person has committed it, there is no occasion or justification for the exercise of judicial power.

One and perhaps the greatest of the evils incident to the administration of the Star Chamber was its inquisitorial method of procedure. Upon *suggestion* or *suspicion* citizens were subpoenaed to appear

before it and subjected to examination under the hateful *ex-officio* oath.

The preamble of the act for the abolition of that infamous Court (July 5, 1641; 16 Charles I., c. 10; 5 S. R., 110) recited among its usurpations the violation of the statute of 25 Edw. III. providing that "none shall be taken by *petition or suggestion* made to the King or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner or by process made by writ original at the common law." And its inquisitorial methods were forever condemned by the declaration that its members should thereafter have no "power or authority to * * * do any judicial or *ministerial* act in the said Court," &c.

(o.) We need scarcely cite authorities in support of the proposition that a Grand Jury cannot legitimately exercise *non-judicial* powers. That an investigation for the purpose of determining *whether* a crime has been committed and, if so, who committed it, does not call for the exercise of any judicial power is, we submit, perfectly obvious.

There can be no exercise of *judicial* power unless there be *parties* to the proceeding, a matter in controversy, an assertion on the one hand and a denial on the other, and, in short, a distinct *issue* to be determined.

Judicial power is that which "adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws.

Cooley, Const. Lim., 132.

In the *Matter of Pacific Railway Commission v. Stanford*, 32 Fed. Rep., 241, it was held that the courts could not legitimately be made the instru-

ments for furthering an unwarranted legislative investigation.

The case arose upon an application of the Pacific Railway Commission for an order requiring a witness before it to answer certain interrogatories propounded to him. The commission was created under the Act of March 3, 1887, authorizing the President to appoint three commissioners to examine the books, papers and methods, and investigate the working, financial management, business and affairs of all railroad companies receiving Government aid, and also to ascertain and report

"Whether any of the directors, officers or employees of said companies, respectively, have been or are now directly or indirectly interested, and to what amount or extent in any other railroad, steamship, telegraph, express, mining, construction or other business company or corporation, and with which any agreements, undertakings, or leases have been made or entered into; what amounts of money or credit have been or are now loaned by any of the said companies to any person or corporation; what amounts of money or credit have been or are now borrowed by any of said companies, giving names of lenders and the purposes for which said sums have been or are now required; what amounts of money or other valuable consideration, such as stocks, bonds, passes, &c., have been expended or paid out by said companies, whether for lawful or unlawful purposes, but for which sufficient and detailed vouchers have not been given or filed with the records of said companies; and further to enquire and report whether said companies, or either of them, or their officers or agents, have paid any money, or other valuable consideration, or done any other act or thing for the purpose of influencing legislation."

The act further authorized the Commission to require the attendance and testimony of witnesses and the production of books and papers, and to administer oaths, declared that the claim of self incrimination should not be allowed, no testimony given

before the Commission being assailable against a witness on the trial of any criminal proceeding, and further authorized the Federal courts to order contumacious witnesses to appear and produce papers, &c., and upon the refusal to do so to punish them for contempt.

In denying a motion for an order compelling a witness to answer certain interrogations, the Circuit Court for the Northern District of California said (per Field, J.):

"The Pacific Railway Commission, created under the Act of Congress of March 3, 1887, is not a judicial body; it possesses no judicial powers; it can determine no rights of the Government or of the companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination as fully as though the commission had never been created; and in such inquiry its report to the President of its action will not be even admissible as evidence of any of the matters investigated. It is a mere board of inquiry, directed to obtain information upon certain matters and report the result of its investigations to the President, who is to lay the same before Congress.

* * * * *

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings or by direct suit for that purpose, of such documents as affect the interest of others, and also in certain cases for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained and their contents made known against the will of the owners."

Judge Sawyer, concurring, said:

"A bill in equity that seeks a discovery upon general, loose and vague allegations is styled a 'fishing bill,' and such a bill would be at once dismissed on that ground (Sto. Eq. Pl., § 325, and cases cited). A general, roving, offensive, inquisitorial compulsory investigation, conducted by a commission *without any allegations, upon no fixed principles, and governed by no rules of law or of evidence, and no restrictions except its own will or caprice, is unknown to our Constitution and laws*, and such an inquisition would be destructive of the rights of the citizen and an intolerable tyranny. Let the power once be established and there is no knowing where the practice under it would end."

And Judge Sabin said:

"Courts do not entertain such investigations or inquiries, or lend their aid thereto. If this power of unlimited, inquisitorial investigation into the affairs of private corporations or companies, or of individuals—and it concerns all alike—shall be once established, who can say where it will end or what will be its limit of injustice at all times, but more especially when called into exercise in times of political excitement, or under the influence of partizan zeal or passion?"

This case was cited with approval in *Interstate Commerce Commission v. Brimson*, 154 U. S., 447, where the 12th section of the Act of February 4, 1887, as amended in 1889 and 1891, was held to be constitutional and valid so far as it authorized the circuit courts to use their process in aid of *duly authorized inquiries before the Interstate Commerce Commission*.

(p.) The learned Judge below in dismissing the writ said (Rec., p. 29):

"It is manifest from the facts recited in the presentment made by the grand jury that the

investigation which they were pursuing was not based upon any specific charge which had been formulated and laid before them by the United States Attorney, and that it was not founded upon their own knowledge, or upon information derived from any source that a specific offense had been committed by either of the two corporations named in the subpoena. It appears to have been one which they were pursuing with the assistance of the United States attorney, directed to the *discovery of some* infraction by one or both of these corporations of the law of Congress of July 2, 1890," &c.

He refers to Mr. Justice Brewer's language in the Frisbie case, *supra* (157 U. S., 160), and Judge Field's charge, *supra* (2 Sawy., 667), to the effect that a grand jury properly investigated any *alleged crime*, no matter how, or by whom suggested to them, in support of the proposition that

"a grand jury has certain inquisitorial powers, and by this is meant the power of instituting an investigation to discover *whether* a *particular crime* has been committed;"

as to the extent and limitation of which, he adds, "there is a pronounced divergency of judicial opinion." After a review of the decisions, which he regards as fairly summarized in the 17 Am. & Eng. Enc. L. (2d Ed.), p. 1279 (*infra*), p. 22, he observes that, apart from the implication of Counselman v. Hitchcock, "the question, whether an improper exercise of the inquisitorial power subverts the jurisdiction of the Court, or is merely such an irregularity as to enable the accused or a witness to invoke the intervention of the Court, or as may vitiate an indictment, has never been decided."

His view is, however, that

"When, after the presentment of the alleged contumacy of the witness by the Grand Jury to the Court he was ordered by the Court to answer questions and produce the documents, the action of the Court was equiv-

alent to an express instruction to investigate *the proceeding mentioned in the presentment.*"

But the "proceeding mentioned in the presentment" was, as the learned Judge had already said, not a specific charge of any kind, but an inquiry "directed to the discovery of some infraction" of the statute.

Although, without the Court's intervention,

"the investigation would have been one upon the border line between the legitimate exercise and the abuse of the inquisitorial power of the Grand Jury,"

it was, in the learned Judge's opinion,

"not one which can be safely held to have been an ultra judicial proceeding. After the intervention of the Court the original abuse of power, if there was any, became innocuous."

The effect of this ruling is that while an inquiry begun in the absence of any charge of crime for the purpose of discovering whether or not some unknown and undesigned violation of a statute has been committed may be an abuse of power on the part of the Grand Jury, the Court may nevertheless by directing the Grand Jury to continue abusing its power render the past abuse, as well as its continuance, innocuous.

This might be true if the investigation were one which the Court had jurisdiction to entertain in the first instance. But our proposition is that there never can be jurisdiction in any court to direct a grand jury inquiry for purposes of discovery, or, in the absence of a specific allegation of crime.

The investigation prosecuted by the Grand Jury being *ultra-jurisdictional* and not merely "upon the border line between the legitimate exercise, and the abuse of the inquisitorial power of the Grand Jury," as asserted by the Circuit Court, it was not rendered innocuous by the intervention of the Court which, as we contend, had no power to direct the institution of the investigation originally.

(7.) The reasons for the complete separation of the legislative, executive and judicial departments

of our government system are many, but none can better suggest the underlying principle of this policy, so far as it applies to the case at bar than the thought so well expressed by Judge Grosscup in the case of *United States v. James*, 60 Fed. Rep., 257, 259, that

"The theory of our criminal proceeding, like that of Great Britain, is accusatory and not inquisitorial."

Matters of pure inquiry, without a controversy, and which may, and presumably will be fruitless—for the presumption of innocence must assuredly outweigh the *suspicion* of a district attorney—are not subjects of *judicial* cognizance.

(r.) In concluding our discussion of this point, we beg to call attention to the pertinent language of Chief Justice MARSHALL in *United States vs. Hill*, 1 Brock. C. C., 159:

"To suppose the powers of a grand jury, created not by express statute, but by the necessity of their aiding the jurisdiction of a court, to transcend that jurisdiction, would be to consider grand juries, once convened, to be clothed with powers not conferred by law, but originating with themselves. This has never been imagined."

FOURTH POINT.

A Grand Jury inquiry for the purpose of discovering whether or not the Sherman Act has been violated is not a "proceeding, suit or prosecution," under that act.

On February 25, 1903, Congress passed an Act appropriating the sum of five hundred thousand dol-

lars "for the enforcement of the provisions" of the Interstate Commerce Act, the Sherman Anti-Trust Act, and Sections 73 to 76, inclusive, of the Revenue Act of August 27, 1894. It was provided that the money should be

"expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct *proceedings, suits and prosecutions* under said Acts in the courts of the United States."

Then comes the following provision:

"*Provided, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said Acts.*"

The question is whether this immunity applies to testimony given before the Grand Jury.

The following considerations tend to show that the immunity contained in the Appropriation Act of 1903 does not extend to testimony given before a grand jury—or at least not to testimony in any investigation like the present:

(a.) The constitutional guaranty against being forced to give incriminating testimony "must have a broad construction in favor of the right which it was intended to secure" (*Counselman v. Hitchcock*, 142 U. S., 547, 562).

It follows that any legislative substitute for it must be plainly adequate. A case of doubt should be resolved in favor of the witness. "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States"

(*Counselman* case, p. 55). Here the immunity from prosecution as to any *transaction, matter or thing* concerning which testimony is given is made sufficiently broad. Similar language in the Act of February 11, 1893 (hereinafter referred to), was held to be a sufficient safeguard in *Brown v. Walker* (161 U. S., 591). But this immunity is worthless here unless the language subsequently used, "proceeding, suit or prosecution," embraces a grand jury investigation. If it does not, then the witness is deprived of his constitutional rights; and any reasonable doubt on this head should be resolved in his favor.

It cannot be questioned that a witness hereafter pleading the immunity afforded by this act as a bar to a criminal prosecution will be held to strict proof of the facts which constitute the bar. Especially will this be so when he seeks to plead this Federal statute as a bar to a prosecution in a State court for an offense committed against its sovereignty. It follows that in construing this statute, which is in derogation of his constitutional rights, every doubt must be resolved in his favor, so that he may have an assured equivalent for the constitutional protection which this statute by indirection takes from him. It may be too late now to urge a revision of that decision of this court which in effect sanctioned another statutory substitute for the same constitutional guaranty; but it is not too late to urge that no substitute, however phrased, be sanctioned unless such a construction of its language is imperative.

(b.) In the *Counselman* case the principal point decided was that Section 860 of the United States Revised Statutes, forbidding that any answer, discovery or evidence obtained from a witness in any judicial proceeding shall be given in evidence or in any manner used against him in a subsequent criminal proceeding is an insufficient substitute for the constitutional guaranty. About a year and a half

later Congress passed the Act of February 11, 1893, providing that no person shall be excused from testifying before the Interstate Commerce Commission or

“in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation”

of the Interstate Commerce Law on the ground that his evidence might tend to incriminate him, but that

“no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpoena * * * or in any such case or proceeding.”

In *Brown v. Walker* (1895) which involved the refusal of a witness to testify before a Grand Jury upon an investigation growing out of an alleged violation of the Interstate Commerce Law, both counsel and Court assumed, without question or discussion, that the Act of 1893 applied to such an investigation, and the Court held that in view of the immunity afforded by that Act the witness was not privileged to refuse to answer self-criminating questions put to him before the Grand Jury. The Court, however, did not consider in that decision whether Congress by the Act of 1893 intended to make any reference to Grand Jury investigations. This is evident from the fact that both in the prevailing opinion and in the dissenting opinion of Shiras, *J.*, the words “or in any cause or proceeding, criminal or otherwise, based upon or growing out of the Act” are omitted from the quotations (pp. 593, 610) which both judges make from the Act of 1893.

No question is now made as to whether Congress by the words used in the Act of 1893 “any cause or proceeding, criminal or otherwise, based upon or

growing out of the Act" intended to refer to Grand Jury investigations. But it is significant that after this court, in *Brown v. Walker*, without discussion of the language used, had applied the Act of 1893 to the case of a witness before a Grand Jury, Congress in the Act of 1903 avoided the use of the words which had been employed in the Act of 1893, viz., "in any cause or proceeding, criminal or otherwise, based upon or growing out of the Act."

If Congress by the Act of 1903 had intended to grant immunity to witnesses testifying to self-criminating matters before grand juries its course was plain. It had but to use the words employed in the Act of 1893 which had already been applied by this Court to grand jury investigations. It did not do so. Furthermore, the failure to use in the Act of 1903 the words which had been employed in the Act of 1893 was not due to inadvertence. The rest of the language employed in the immunity clause of the Act of 1903, was copied verbatim from the Act of 1893, viz.: "No person shall be prosecuted or (be) subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise"—At this point there was a deliberate and most significant departure from the words which in *Brown v. Walker* had been assumed to embrace Grand Jury investigations.

But there is convincing internal evidence in the Act of 1903 apart from this that it was framed with special reference to the decision in *Brown v. Walker*, and with full appreciation of the effect of that decision, for on the sole authority of that decision Congress omitted from the Act of 1903 as unnecessary the words which had been employed in the Act of 1893, and theretofore in all similar statutes, viz., that "No person shall be excused from testifying" as to self-criminating matters, &c.

It may be said, therefore, with confidence that in the Act of 1903 Congress deliberately, intentionally and advisedly avoided the use of the language which this Court, in construing the Act of 1893, had assumed to embrace grand jury investigations. This deliberate, intentional and advised action of Congress, we submit, is inexplicable except on the theory that Congress, in using the language of the Act of 1903, did not contemplate that the statute should be construed as applicable to grand jury investigations, but, on the contrary, intended that it should not be susceptible of any such construction.

The reasons which would naturally have inclined Congress to refrain from embracing grand jury investigations within the purview of the Act of 1903 are manifest. The views of the four dissenting justices in *Brown v. Walker* called forcibly to the attention of Congress the particulars in which the immunity afforded by the Act of 1893 might not be an equivalent for the protection afforded by the constitutional guaranty, and it was pointed out specially in the dissenting opinion of Mr. Justice Shiras that it was not a matter of perfect assurance that a person who has compulsorily testified before a grand jury will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. The investigations of grand juries are in secret. An oath binds each grand juror to secrecy. No one is allowed to be present but the grand jurors, the representative of the government and the witness. The witness is not entitled to the presence of counsel. No friends can be present, as in every other investigation known to our laws, by whom he may prove the transactions, matters and things concerning which he gave evidence before the Grand Jury whenever occasion arises to use that evidence as a bar to a criminal prosecution. He cannot have his own stenographer present, as in every other investigation known to our laws, from whose notes he can

prove with precision exactly what took place before the Grand Jury whenever an occasion arises to do so; and except on rare occasions, as in the present instance, the government has none present; and the presence or absence of an official stenographer is, of course, optional with the government. The life of the Grand Jury itself is ephemeral. When its short term of service is over its members are dispersed and scattered. As a rule, they leave behind no record, except indictments found and not found, of any proceeding or complaint which has been before them or of any evidence which has been given before them. The recollection of the grand jurors themselves may prove too indistinct and unreliable to be of service to the witness in proving his plea, for they have no such motive as he has to observe and remember the details concerning which he testified and gave evidence. The result may be that when he moves to quash the indictment he may have only his own oath in support of his motion and against him will probably be arrayed the affidavit of the United States Attorney and of every grand juror that they have no recollection of any such occurrence as that to which he deposes.

This is what might well occur in case the witness were indicted by a State Grand Jury after a Federal Grand Jury investigation in the same district. But imagine the difficulties of the witnesses' situation if months or years after a Federal inquiry in New York he were indicted in some remote county in California for something regarding which he had testified before the New York Grand Jury.

We may say, in addition to all this, that where, as in the case at bar, there is no *charge*, no framed bill of indictment, nothing but the mental processes of the Government's attorney by which to measure or determine the scope and purpose of his voyage of discovery, and merely his *assertion* as to what it is, and what law it is "*under*," no witness could even lay the *foundation* for his plea of immunity.

The peril to which a witness before a Grand Jury is thus exposed by the withdrawal of his constitutional guaranty is not fanciful, improbable or remote. The Kansas statute compelling witnesses to give self-criminating testimony before grand juries (Gen. Stat., 1901, Sec. 7378), recently construed by this Court in *Jack v. Kansas*, contained this provision:

“The evidence of all witnesses so subpoenaed shall be taken down by the reporter of said court and shall be transcribed and placed in the hands of the county attorney or the attorney general.”

There a witness would have a protection which he has not under the Federal statute.

These considerations were quite sufficient to incline Congress to extend no further the requirement that witnesses must give self-criminating evidence before grand juries, and to so frame the Act of 1903 as not to embrace grand jury investigations. And the fact is that for ten years after the passage of the Act of 1893, which applied only to causes and proceedings, criminal or otherwise, based on or growing out of the Interstate Commerce Act, Congress, while leaving the Act of 1893 on the statute book, made no attempt to extend any of its features to the Sherman Anti-Trust Law or to the Anti Trust sections of the Revenue Act, and when it passed the Act of 1903 it deliberately and intentionally made use of language very different from that employed in the Act of 1893.

It is equally obvious that the considerations above noted might not incline Congress in dealing with the Interstate Commerce Law to qualify the language which, in *Brown v. Walker*, had been assumed to include Grand Jury investigations. We find that in the Act of February 19, 1903 (“An Act to further regulate commerce with foreign nations and among the States,” being a supplement to the Interstate Commerce Law), Congress employed lan-

guage evincing its intention to continue the broad and sweeping scope of the Act of 1893 with respect to Grand Jury investigations into alleged violations of the Interstate Commerce Law. The reason why in the act passed but six days later there was so marked a change of language is plain. This court had pointed out the remoteness of the danger from subsequent prosecutions to be apprehended by a witness even before a grand jury when called to testify concerning alleged violations of the Interstate Commerce Law. The matters which constitute violations of the Interstate Commerce Law could scarcely be the subject of State regulation, and the chance of a State prosecution for other causes arising out of disclosures before Federal grand juries so remote as to be negligible. But every State has its anti-trust laws, either in the form of specific statutes directed against combinations in restraint of trade, or statutory or common-law conspiracy provisions covering every form of unlawful agreement to commit acts injurious to trade and commerce, so that it is almost impossible to conceive of any violation of the Federal anti-trust laws which would not also involve a violation of the anti trust laws of the State in which it was committed.

(c.) What then did Congress mean by the language employed in the immunity clause of the Act of 1903, viz., "any proceedings, suits or prosecutions"?

The first three sections of the Sherman Anti-Trust Law declare certain things to be misdemeanors; the fourth section provides for what are therein called "*proceedings in equity* to prevent and restrain" violations of the Act; the fifth section provides for bringing in additional parties to "any *proceeding*" under Section IV.; the sixth section provides for what are therein called "*proceedings*" for the seizure and condemnation of property used in violating the Act; and the seventh section provides for

what is therein called a "*suit*" by any one injured by a violation of the Act to recover threefold damages.

Obviously, the draughtsman of the Act of 1903 had before him the text of the Sherman Anti-Trust Law and adopted from it, without a change of meaning, the words "proceedings" and "suits," and added the new word "prosecutions" only because "misdemeanors" was inappropriate for his purpose. By "proceedings" he meant "*proceedings in equity* to restrain violations of the Act and *proceedings* for the seizure and condemnation of property used in violating the Act; and he was thinking of nothing else so far as the Anti-Trust statute was concerned. By "suits" he meant suits by injured parties to recover threefold damages under the Act; and by "prosecutions" he meant criminal prosecutions for violations of the Act. He found that these words were also appropriate, when applied to the Interstate Commerce Act and to the Anti-Trust sections of the Revenue Act, to designate the specified proceedings, suits for damages and prosecutions under those Acts, and he, therefore, had no occasion to use any others. But he evidently first found them in the Anti-Trust statute and appropriated them without change of meaning. Therefore, the proceedings referred to in the Act of 1903 are the specific proceedings provided for in each of the three Acts mentioned.

It is true that the word "proceeding," if used in its generic sense, has a very broad meaning—sufficiently so, indeed, to include both "suit" and "prosecution." Obviously it was not used here in that broad sense, for if so the subsequent use of the words "suit" and "prosecution" would have been worse than surplusage.

Neither can it be construed as a drag net intended to cover anything of the same general nature as a "suit" or "prosecution" or ancillary thereto, but not strictly within those terms, for such a meaning can be assigned only when it follows an enumeration,

and not when it is the first of several enumerated terms.

Standing as it does here the first, and therefore the most conspicuous, of three enumerated coordinate terms, it should, if possible, be assigned a meaning as precise, as narrow and as descriptive of a definite independent thing as either of the other enumerated terms. That is its natural and ordinary meaning as here used. Now proceedings in equity to restrain violations and confiscation proceedings were the most conspicuous remedial features of the Anti-Trust Law. The two other remedial features were suits and prosecutions. What more natural than to mention these three remedial features in the language here used as "proceedings, suits or prosecutions," meaning thereby specified proceedings under the Act, suit for damages under the Act, and prosecutions under the Act.

These views find support in the authorities.

In *Windt v. Banniza*, 2 Wash., 147, the Court was considering a statute permitting appeals "in all actions and proceedings." It will be noted that there the word "proceedings" did not precede, but followed, the word "actions." The Court said:

"We are of the opinion that the word 'proceedings' in contradistinction to 'actions' must be taken to include not the orders of the Court in matters arising in the progress of the action, or merely incident or ancillary thereto, but only those matters outside of ordinary actions and commonly known as special proceedings. * * * Ordinarily speaking, every step taken in an action is a proceeding. * * * We do not believe the legislature intended that the word should be understood in any such sense" (pp. 153-4).

In the case at bar the word "proceeding" is associated not with the word "action," but with the similar word, "suit," and it is natural to give it the meaning of proceeding in equity under the Act, pro-

ceeding for seizure and condemnation under the Act, &c., as distinguished from something merely incidental to a suit. Indeed, as already pointed out, where the word "proceeding," instead of following, precedes the other enumerated terms it is impossible to consider it as something merely incidental to the two other enumerated terms.

It is natural to construe the word "proceeding" as relating to the enforcement of the *civil* right or remedy, since many such proceedings are specified in the acts in question. But even if the language used had been "criminal proceedings" it would still not cover this Grand Jury investigation.

In *Post v. United States* (161 U. S., 583) the statute of July 12, 1894 (2 Stat., 102), was under consideration. It provides that

"All criminal proceedings instituted for the trial of offenses against the laws of the United States, arising in the District of Minnesota, shall be brought, had and prosecuted in the division of said district in which such offenses were committed."

The act took effect from the date of its passage, July 12. The June term of the Grand Jury for the District of Minnesota, 1894, was impaneled on July 5, and continued in session until July 20. On this last date it returned two indictments against Post.

"All the persons whose names were endorsed upon the indictments were duly summoned in these cases, before the Grand Jury, prior to July 5, 1894, and in obedience to such summons were in actual attendance upon the Court prior to July 12, 1894 " (p. 584).

Post demurred to the indictments on the ground that the matters and things set forth in them were offenses alleged to have been committed in the Fifth Division of the District, while the indictments were found outside of that division. The demurrer was

overruled. The defendant was convicted and the judgments of conviction reversed. This Court said:

"The point of time at which the act is to apply to a particular case is not the time of committing the offense, but the time of instituting the proceedings. Treating the direction as operating prospectively only, that 'all criminal proceedings instituted' 'shall be brought, had and prosecuted' in a particular division, it obviously includes all proceedings which shall be, and none which have been, instituted. Without regard, therefore, to the time of the commission of the offense, all the proceedings for its prosecution, if instituted after the Act of 1894, took effect, must be in the division in which the offense was committed; but if instituted before this act took effect they might go on as under the earlier acts in any division * * * Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused either by indictment presented, or information filed in court or at the least by complaint before a magistrate * * * The submission of a bill of indictment by the attorney for the Government to the grand jury and the examination of witnesses before them are both in secret, and are *no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced.*"

Neither is an inquiry before a grand jury a "suit" or a "prosecution." That it is not a suit is too obvious to require argument or citations. It is just as certainly not a "prosecution."

U. S. Const., Amend. VI.

Post v. U. S. (supra).

Virginia v. Paul, 148 U. S., 107.

State v. Wolcott, 21 Conn., 279.

If inquiries by grand juries are "criminal prosecutions" what becomes of the Constitutional requirement that "In all *criminal prosecutions* the

accused shall enjoy the right to a * * * public trial * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The secrecy of the grand jury room could not be maintained under this provision if grand jury inquiries were criminal prosecutions. It is evident, therefore, that the founders of the Constitution did not consider the prosecution begun until the indictment was found.

This is a sound view, for until indictment found the grand jury is not a prosecuting body but an inquiring body. It is one of the historical bulwarks of the liberties of the individual—a protection to the subject or citizen against unjust prosecution, and as such it is referred to in the Fifth Amendment.

There can be no prosecution for a capital or otherwise infamous crime until a grand jury has determined that there is reasonable ground for such prosecution. This was the meaning of the Constitution. The Grand Jury investigation was a necessary prerequisite to a criminal prosecution, but it was no part of that prosecution.

Post v. United States (supra), expresses the same views. Criminal proceedings as there used were considered as embracing and indeed co-extensive with the criminal prosecutions, and it was held that the criminal proceeding was not begun until the indictment was found. The Court said (p. 587):

"Submission of a bill of indictment * * * to the Grand Jury and the examination of witnesses before them * * * are *no part of the criminal proceedings* against the accused."

In *Virginia v. Paul*, 148 U. S., 107, it was said by this Court, in construing the Removal Act, Sec. 643 of the Revised Statutes, by Gray, J. (p. 119):

"Proceedings before a magistrate to commit a person to jail or to hold him to bail in

order to secure his appearance to answer for a crime or offense, which the magistrate has no jurisdiction himself to try, before the Court in which he may be prosecuted and tried are but *preliminary to the prosecution* and are no more a commencement of the prosecution than is an arrest by an officer without a warrant for a felony committed in his presence."

In *State v. Wolcott*, 21 Conn., 272, it was held, and, of course, necessarily, *Church, Ch. J.*, writing the opinion, that the provision of the Connecticut bill of rights that "in all criminal prosecutions the accused shall have the right to be heard by himself and by counsel * * * to be confronted by the witnesses against him, and to have compulsory process to obtain witnesses in his favor" had "never been understood to apply to Grand Jury enquiries."

But whatever word may be appropriately used to describe the investigation by a Grand Jury of a specific complaint against a specified individual, there can be no question that it would be an abuse of language to apply the term "prosecution" to the inquiry which was being conducted by the Grand Jury in the case at bar, where there was no specific complaint against any specified person, and where the investigation was conducted for the sole purpose of "discovering" whether or not there had been some violation, to them unknown, of the Sherman Anti-Trust Act.

(d.) It has been urged on behalf of the Government as an argument of "utility" that a construction of the Act of 1903, which would make it inapplicable to grand jury investigations, would clearly defeat the obvious purpose of the Sherman Act.

The objection is unsound. The construction of the act for which we contend may be an obstacle in the way of perverting the machinery of the grand jury to improper uses, but it will not interfere with

an efficient enforcement of the prohibitions of the act.

The complete success of the Government in the *Trans-Missouri* (166 U. S., 290) *Joint Traffic* (171 U. S., 505) *Addyston Pipe* (175 U. S., 211) and *Northern Securities* (193 U. S., 197) cases without the aid of a grand jury investigation in itself proves that public officers can enforce the provisions of the Sherman Act, in all its branches, without any benefit from the Act of 1903, and certainly without the benefit of the unwarranted construction which the Government seeks to place upon that Act. And if after the determination of these cases there had been any desire to prosecute any one for the misdemeanors which they disclosed, the way to do so was open and clear of obstacles, and the evidence was at hand and available.

The objection loses sight of the fact that the chief remedial features of the Sherman Act were proceedings or suits in equity to restrain violations of the act, and proceedings for the seizure and condemnation of "any property owned under any contract, or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in Section 1."

Where no overt act has been committed in violation of the Sherman Law to the prejudice of the public, there is no occasion for any prosecution, civil or criminal. And where there has been an overt act in violation of the law, if a proceeding in equity to restrain the violation does not afford a sufficiently effective means for stopping the abuse and laying the foundation for a criminal prosecution, certainly the confiscation of the corporate property does. In the former proceeding the Government has the fullest opportunity of obtaining evidence at its leisure, step by step, before a master, and of compelling the production of incriminating evidence and papers when that is deemed desirable. If, in the course of that proceeding, it is discovered that any specific crime has been

committed by any specific person or corporation in violation of the Sherman Law, the Government may then lay that evidence before a federal grand jury and ask for an indictment. Nor will there then be any obstacle in the way of compelling the witnesses who have testified in the proceeding in equity from repeating their testimony word for word, *viva voce*, before the grand jury. Having given their testimony once publicly in the proceeding in equity, where every word uttered is recorded, no witness can be thereafter prosecuted for any transaction, matter or thing as to which he so testified and so cannot object, on the ground of self-crimination, to repeating that testimony before a grand jury.

The grand jury will then be engaged in the exercise of its legitimate functions, the weighing of evidence against the accused, already known to the prosecuting officer, for the purpose of determining whether an indictment can properly be based upon that evidence. They will not then be called upon to act as a detective bureau or police office, rummaging through private papers of, perchance, innocent parties to discover whether or not something cannot be found in some paper which will fix upon some person some possible crime.

No violation of the Sherman Law is made by that law more serious than a misdemeanor. In the case of a corporation the extreme penalty is a fine of five thousand dollars. Does this not of itself show that criminal prosecutions under the Sherman Law were a secondary and comparatively unimportant remedial feature of that act, and that it was contemplated that they should be resorted to only when there was in the hands of the Government direct evidence of the commission of a specific violation of the act by a known person—a situation which would always follow in the wake of a successful proceeding in equity to restrain a violation, or after the more drastic measure of seizure and forfeiture.

The Government seemingly would transpose the order of procedure contemplated by Congress. It

would use a grand jury investigation for the ostensible purpose of discovering evidence on which it could recover from a corporation a paltry fine, and then, perhaps, thereafter make that evidence the basis, as Congress never intended it should be, of the really serious remedies by way of injunction or forfeiture. With great respect it is urged that they should pursue the same course which Congress marked out, by directing their attention to restraining overt violations of the Sherman Law, seizing and condemning the property of offenders, and then when they have legal proofs in hand, prosecuting individuals on indictments properly found, based on evidence submitted by the United States Attorney in support of definite charges made by him against specific individuals.

The construction of this act for which we contend does not thwart any purpose of Congress, but really effectuates the legislative intent.

FIFTH POINT.

The Act of February 25, 1903, is unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, thus infringing upon the provision of the Tenth amendment to the Constitution of the United States that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

A view contrary to this contention was expressed in the prevailing opinion of this Court in *Brown*

v. Walker, supra. In that case there was considered an investigation of the charge that certain railroad companies had violated the Federal Interstate Commerce Act. In opposition to the contention that the Federal statute was not adequate in its immunity, because there was a possibility that the witness would disclose in his testimony transactions which involved violations of State laws, the Court held that the probability of a prosecution under any State law on account of any transaction with respect to which the witness is compelled to answer is so remote as to be a negligible quantity; and, moreover, that since the Constitution provides that the Constitution itself and the laws enacted in accordance with it shall be the supreme law of the land, an immunity from prosecution, or pardon extended by congressional enactment, is effective even as against a prosecution by the State authorities for a violation of a State statute.

The second of these grounds was not necessary to a decision of the case; the first was unquestionably sufficient to warrant the decision, for there was in that case a most remote probability that the witness would be called on to defend a State prosecution on account of any transaction disclosed by him. He was being examined relative to alleged infringements of the Interstate Commerce Law—No State has, nor can it have, any analogous criminal statute. It was conceivable, of course, as argued in that case by the witness' counsel, that his testimony would bring to light an embezzlement committed by himself, or a larceny, or, perchance, a murder—conceivable, but so remote in its probability as not to be worth considering.

The view expressed by the majority of the Court in *Brown v. Walker*, that Congress may constitutionally and effectively pardon offenses committed against the valid criminal statutes of the States has not been definitely adopted or affirmed by any subsequent decision, and the words used in an opinion

very recently delivered (*Jack v. Kansas*, decided November 27, 1905) indicate that it was the improbability of State prosecution, rather than the efficacy of the immunity against such State prosecution, that was decisive of *Brown v. Walker*. Speaking of that case, this Court, through Mr. Justice Peckham, says:

“While it was asserted that the law of Congress was supreme, and that judges and courts in every State were bound thereby, and that therefore the statute granting immunity would *probably* operate in the State as well as in the Federal courts, yet still, and aside from that view, it was said that while there might be a bare possibility that witness might be subjected to the criminal laws of some other sovereignty, it was not a real and probable danger, but was so improbable that it needed not to be taken into account.”

The case from the opinion in which this quotation is made (*Jack v. Kansas*) was one in which the probability of prosecution in another jurisdiction, or by another sovereignty was remote as compared with the case at bar. In that case certain owners of coal mines located in Kansas were charged with having combined to fix the price of coal at the mines, and the price to be charged to purchasers in violation of the Kansas Anti-Trust Law. The witness was asked as to the existence of any agreement between the coal operators with regard to fixing the price of coal to be sold to residents and citizens of Kansas. It was conceded that the State immunity statute was sufficient to protect the witness against any prosecution in the Courts of that State. Considering the limitations on Federal jurisdiction, and the nature of the business in which the defendants were engaged, and the carefully limited scope of the questions put to the witness, it is apparent that the danger to the witness of revealing a transaction that would subject him to Federal indictment and prosecution

was, to say the worst, not imminent. Whether or not such danger was so remote and unsubstantial as to justify its being treated as negligible, might very well be a matter about which there could arise a difference of opinion, and a difference of opinion did arise in this court.

But there can be no difference of opinion as to the practical danger to this appellant of a prosecution under the laws of the State of New York, in the courts of New York, on account of transactions about which he is asked to testify. It sufficiently appears from the record that the Grand Jury was engaged in some inquiry having for its object the discovery of whether or not violations of the Sherman Act had been committed within the Southern District of New York. There is a statute in that State (Laws of 1899, Ch. 690; Birdseye's Rev. St. of N. Y., 3d Ed., p. 2405) which condemns not only any corporation, but any officer or agent thereof who makes, or attempts to make, or enter into any agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in the State of any article or commodity of common use is, or may be, created, established or maintained, or whereby competition in the State may be restrained or prevented. This statute provides that the corporation may be fined, and the officer or agent fined or imprisoned, or both, for each violation. It is manifest that if the appellant's answers to the questions asked throw light upon a violation by his corporation of the Sherman Anti-Trust Law, they will by the same light reveal a violation by him and his corporation of this Donnelly Anti-Trust Law, which has full force and effect, and frequent enforcement, in the State courts of New York.

Circuit Judge Van Devanter, in his remarkably lucid oral opinion delivered recently in the *Paper Trust* case, now on appeal to this Court, recognized the practical danger that a witness in an investiga-

tion under an Anti-Trust Law encounters of a prosecution under a State law:

"Now it is also said—and that argument addressed itself to me with great force—that intrastate and interstate transactions are so commingled in carrying into effect a combination such as is here alleged, that the disclosure of that which is interstate will necessarily be accompanied by the disclosures of that which is intrastate; that it happens in this instance that if there be such a combination it is unlawful not only in respect of that which is interstate, but also in respect of that which is intrastate, and that, therefore, the disclosure would subject the witnesses to prosecution both under the Federal statute and under the State statute."

Can any one say it is practically impossible, or even unlikely, that if under the Knight case, or some other adjudication, it is found impracticable to convict defendants of any breach of the Sherman Anti-Trust Law, the Attorney General in New York will direct a prosecution under the Donnelly Anti-Trust Law of that State against the corporation and its directors for the offense which appellant may have testified to before the Federal Grand Jury?

There is then a very real danger to the witness, and his immunity exists only in name, unless it is a sound proposition that under our system of government a man armed with a Congressional pardon may defy the State authorities in their efforts to punish him for a crime against the peace and dignity of the State. It is not intended to argue elaborately against that proposition.

It seems to give to the Federal legislature a supremacy never intended by the framers of the Constitution—a right to nullify the efforts of a State to maintain peace and good order and good morals within its own borders.

If this court intended to hold in *Brown v. Walker* that the Federal legislature possessed this power, we, of course, bow with respect to its decision. But if,

on the other hand, the Court did not so intend, but left the question open, merely intimating its view, as Mr. Justice Peckham's opinion in the *Jack* case seems to indicate, that "the federal statute would *probably* operate in the State as well as the Federal courts," then since it is fairly presented in the case at bar, we ask for a determination of this most important question.

SIXTH POINT.

The order of May 5th, requiring the appellant to produce the papers called for by the subpoena duces tecum, was made in violation of his rights and the rights of the MacAndrews & Forbes Company under the Fourth Amendment.

The ancient English practice of arresting persons under general warrants, without previous evidence of their guilt or identification of their persons, and of searching for and seizing private papers in the hope that they might disclose evidence incriminating the owner, survived the English Revolution, and was continued without question, on the ground of *usage* (precisely as in the case at bar the Government undertakes to justify inquisitorial grand jury investigations on the ground that they are permitted by the common practice of the times) until the reign of George III., when it received its death blow in the decision of Lord Chief Justice Camden in the celebrated case of *Entick v. Carrington*, 19 How. St. Tr., 1029.

In an account dealing with the final overthrow of the practice, in vogue so many generations notwithstanding its illegality, May, in his admirable work on the Constitutional History of England (Chap.

11), describes the embarrassment in which Lord Halifax found himself upon the publication of No. 45 of the *North Briton*. He so perfectly depicts the attitude of the learned counsel for the government in the present case that we may be pardoned if we quote:

“There was a libel, but who was the libeller? Ministers knew not, nor waited to inquire after the accustomed forms of law; but forthwith Lord Halifax, one of the secretaries of state, issued a warrant, directing four messengers, taking with them a constable, to search for the authors, printers and publishers; and to apprehend and seize them, together with their papers, and bring them in safe custody before him. No one having been charged or even suspected—no evidence of crime having been offered, no one was named in this dread instrument. The offense only was pointed at, not the offender. The magistrate who should have sought proofs of crime deputed this office to his messengers. Armed with their roving commission, they set forth in quest of unknown offenders; and, unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect. Nor were they triflers in their work. In three days they arrested no less than forty-nine persons on suspicion—many as innocent as Lord Halifax himself. Among the number was Dryden Leach, a printer, whom they took from his bed at night. They seized his papers, and even apprehended his journeymen and servants. He had printed one number of the ‘*North Briton*,’ and was then reprinting some other numbers; but as he happened not to have printed No. 45, he was released without being brought before Lord Halifax. They succeeded, however, in arresting Kearsley, the publisher, and Balfe, the printer, of the obnoxious number, with all their workmen. From them it was discovered that Wilkes was the culprit of whom they were in search; but the evidence was not on oath; and the messengers received verbal direc-

tions to apprehend Wilkes under the general warrant. Wilkes, far keener than the crown lawyers, not seeing his own name there, declared it 'a ridiculous warrant against the whole English nation,' and refused to obey it. But after being in custody of the messengers for some hours, in his own house, he was taken away in a chair, to appear before the secretaries of state. No sooner had he been removed than the messengers, returning to his house, proceeded to ransack his drawers, and carried off all his private papers, including even his will and pocket book. When brought into the presence of Lord Halifax and Lord Egremont, questions were put to Wilkes which he refused to answer; whereupon he was committed close prisoner to the Tower, denied the use of pen and paper, and interdicted from receiving the visits of his friends, or even of his professional advisers."

The distinction between the methods employed against the appellant and those adopted against the victims of Lord Halifax's wrath, is, however, that *there* there was a libel, whereas *here* there is not even a charge of crime, or anything more than speculation, that perhaps some crime may be discovered. In all other particulars the cases are identical from a legal standpoint so far as the personal restraint of individuals is concerned—arrest and imprisonment under a warrant, and the restraint and invasion of the right of privacy imposed by a subpoena being equally a deprivation of liberty. The only other difference is that Lord Halifax's messengers actually searched for and seized papers, whereas here the Court's order merely gave the petitioner the choice of producing them forthwith or submitting to imprisonment until he did.

Wilkes questioned the legality of these general warrants and carried the matter to the courts, with the result that in 1765 Lord Camden's famous decision was rendered declaring the warrants illegal

and void. Of this decision, Mr. Justice Bradley said in the *Boyd* case (116 U. S., 616, 626-7):

“As every American statesman during our revolutionary and formulative period as a nation was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizure.”

The broad principle laid down in Lord Camden's opinion was that what is not to be found in the books is not law, and, therefore, that every invasion of private property is a trespass, and must be justified or excused by some positive law.

After describing the power claimed by the Secretary of State for issuing general warrants, and the manner in which they were executed, Lord Camden said:

“Such is the power, and, therefore, one should naturally expect that the law to warrant it should be clear in proportion, as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.

“The great end for which men entered into society was to secure their property. That right is preserved, sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be

nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books, and if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall intitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice.

It is the only case of the kind that is to be met with. No less a person than my Lord Coke denied its legality, 4 Inst., 176; and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description.

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory and deliver a copy; my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing."

After showing that these general warrants for search and seizure of papers had their origin in the Court of Star Chamber, and never had any advocates in the common law courts except Chief Justice Scroggs and his associates, Lord Camden adds:

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to

get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery and house-breaking—to say nothing of forgery and perjury—that are more atrocious than libelling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. There, too, the innocent would be confounded with the guilty.”

Lord Camden concluded thus:

“I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of the opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.”

Said Mr. Justice Bradley, after quoting the foregoing extracts from Lord Camden's opinion (116 U. S., 616, 630):

“The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where

that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

The Fourth Amendment is as follows:

"The right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

In the *Lester* case (77 Georgia, 143), from which we quoted under a previous point, the Supreme Court of Georgia said:

"It is the right of any citizen or any individual of lawful age to come forward and prosecute for offenses against the State, or when he does not wish to become the prosecutor, he may give information of the fact to the grand jury, or any member of the body, and in either case it will become their duty to investigate the matter thus communicated to them, or made known to one of them, whose obligation it would be to lay his information before that body. This, however, differs widely from forcing a person to reveal his knowledge to the inquest. The latter process is in the nature of an unlawful search, against which citizens are protected by constitutional provisions. Neither houses, nor desks, nor secretaries, nor other places of deposit, can by such general proceedings be opened and rifled of their contents, for the purpose of enabling

the grand jury to find out whether a crime had been committed, with a view of presenting it. General warrants, issued for accomplishing such a purpose, are absolutely void, and will afford no protection to any officer or party engaged in their execution, when called upon to answer for an invasion of personal rights under such circumstances."

Manifestly no less stringent a rule applies to the issuance of a *subpœna duces tecum* than to the ordinary *subpœna ad testificandum*; yet the Supreme Court of Pennsylvania said, in speaking of the latter form of process:

"As this writ is a very arbitrary one, obliging the citizen to leave his home and abandon his business, however important it may be, and give his attendance at court, wherever that may be sitting, it is very important to know what parties are entitled to it; for if it be issued at the suit of one having no right thereto, it is no contempt to disobey it. The Commonwealth may have this process in any proceeding where its interest is apparent, whether as a suitor or a prosecutor, and so may parties in courts, either civil or criminal; but we have yet to learn that any such right exists in a court, in its mere character as a court, separated from the case which it has in hand."

Appeal of Hartranft, 85 Pa. St., 433.

Although the *subpœna* in the case at bar is in form the writ and process of the Court, under its seal, signed by the clerk, tested in the name of the Chief Justice, and purports to have been issued in the course of a duly instituted judicial proceeding, the fact is, as the record clearly shows, that when it was prepared and served, and when in obedience to its terms the petitioner presented himself before the Grand Jury, there was no judicial matter of any kind pending in the Court, or before the Grand Jury; and it is equally clear that the origin of the *subpœna*, and the only pretext for its issuance, was the desire of

the learned Assistant District Attorney to ascertain, by interrogating the appellant, and by inspecting the private papers and documents of the corporation of which he was secretary, whether or not that corporation, and another, or either of them, had or had not, in some way unknown, violated the Sherman Act. Neither of these corporations was charged by anyone with having committed any particular act or acts denounced as criminal by that statute. No one had filed any sworn accusation against them before any court or magistrate. No bill of indictment had been drawn and submitted to the grand jury. So far as the record shows they were not even *suspected* of crime. But because, and solely because, the legal representatives of the government thought, or imagined, or had perhaps been told by some business rival of one or both of these companies, or some individual cherishing a fancied grievance, that if the appellant was questioned and compelled to reveal his company's private business affairs and secrets, and submit their books and papers to the prying eyes of the government's representatives, it might be discovered that at some time or place the MacAndrews and Forbes Company had, in some manner, violated some provision of the Sherman Act, the Clerk of the Circuit Court, upon the request of the United States Attorney, signed and affixed the seal of the Court to a piece of paper in the form and semblance of a subpoena *duces tecum*. The Clerk handed it to the Marshal, and one of the Marshal's deputies, after handing it to the appellant, doubtless made a formal return to the Court in which he certified that it had been duly served. It was on the strength of the pretended legal validity of this piece of paper that the appellant was compelled to leave his business and attend before the Grand Jury; and it is because he refused to answer the questions the District Attorney put to him in the Grand Jury room, and declined to produce what the paper called for, that he was arraigned in court,

ordered by the Court to answer the questions and produce the papers, adjudged in contempt for a failure to comply with the order, and, finally, committed to the custody of the Marshal until he did so comply.

But, irrespective of the origin of the subpoena, and the jurisdiction of the Grand Jury to conduct such an investigation as that disclosed by the record, its further extraordinary nature must be taken into consideration. As the Circuit Judge said:

"The petitioner was required to produce a numerous array of documents and papers for the purpose of ascertaining whether they contained anything which would tend to establish the commission of an offense by either of the two corporations; and it is apparent that the object was to enable the Government by inspecting this mass of the private papers and documents of the petitioner's corporation to find something which might induce the Grand Jury to find an indictment against his corporation (Record, p. 33). * * * It falls but little short of being, in substance and effect, a roving commission devised by the Government to compel a witness to bring before the Grand Jury a general mass of the private papers of his principal in order that the prosecuting officer might discover whether at any time during its corporate life the principal had been a party to any act which could afford the basis of a criminal accusation" (*Id.*, p. 34).

It thus appears:

(a.) That the subpoena was issued in the absence of any pending charge or issue in respect to which the relevancy or irrelevancy of the papers, &c., could be asserted, much less determined, and was, therefore, an unlawful invasion of the right of privacy of the appellant and his corporation, regardless of their criminal nature.

(b.) It was a roving commission designed to force the production for search of all the correspondence

and agreements of the corporation during its entire corporate life with a large number of individuals and other corporations, and was for this reason an equal invasion of the right of privacy regardless of the character of the papers called for

(c.) It was issued as a means of forcing the corporation, through the appellant, a temporary custodian of the same, to produce for search its private papers and documents in order to fix upon the corporation the commission of some crime, and thus, by indirection compel it to furnish evidence against itself in a criminal case. It contemplated, in fact, the very thing that Mr. Justice Bradley holds to be within the condemnation of Lord Camden's judgment, namely, the "forcible and compulsory extortion of (the corporation's) private papers to be used as evidence to convict (it) of crime."

Boyd v. United States (supra).

The learned Circuit Judge, referring to the dragnet nature of the subpoena, and the purpose for which it was issued, says:

"It is this which gives to the proceeding its color of oppression, and the attributes of an unreasonable search and seizure. * * * This was a wanton assault upon the right of privacy, and in my judgment the process in view of the circumstances under which, and the purpose for which it was issued, authorized an unreasonable search and seizure of papers within the spirit and meaning of the Fourth Amendment" (Record, pp. 33-34).

We submit that either of the vices above pointed out was of itself sufficient to defeat the endeavor of the Government to enforce the production of the corporation's books and papers.

As we have shown, the case of *Entick v. Carrington* was decided upon the principle that any invasion of the right of privacy is a trespass, and can only be excused or justified by some positive law

expressly authorizing it. The fourth amendment was designed to permanently ingraft this principle in our system of government, and whether a subpœna *duces tecum* for papers or a search warrant for chattels be issued, the spirit of the amendment demands that while in the latter case there must be probable cause, supported by oath or affirmation, with a description of the place to be searched, &c., in the former it must be shown to the Court or authority issuing the process that there is some proper cause pending in relation to which the papers or documents called for are material evidence.

In re Lester, 77 Georgia, 143.

Appeal of Hartranft, 85 Pa. St., 433.

Ex parte Brown, 72 Missouri, 83.

In re Moser, 101 N. W. Rep., 588.

The process must, moreover, give a reasonably accurate description of the papers whose production is sought.

Ex parte Brown, *supra*.

In re Moser, *supra*.

Sandford v. Nichols, 13 Mass., 286.

In the *Moser* case (*supra*) the Court said:

“Whether the production is by search warrant or by a *subpœna duces tecum*, the necessity therefor must be shown to the Court, and the particular documents or records required sufficiently specified in the application; and in either process courts will permit only the examination of such parts thereof as relate to the issue before the Court.”

(a.) We have already shown that the subpœna in the case at bar was issued in the absence of any pending judicial cause or proceeding in respect to which the relevancy of anything called for by the subpœna could be determined or even asserted.

(b.) It is furthermore obvious that so far from describing the papers whose production was sought

with reasonable accuracy, it lacked any specification whatever in that regard.

The situation was, indeed, not unlike that in *ex parte Brown, supra* (72 Mo., 83), where the petitioner, the manager of the Western Union Telegraph Company at St. Louis, was committed for contempt by the St. Louis Criminal Court for refusing to obey a subpoena *duces tecum*, calling for the production of "any or all telegraphic dispatches or messages, or copies of the same," then in the company's office, described as "Dispatches between (various parties named) sent or received by or between any or all of said parties, within fifteen months last past."

The Supreme Court of Missouri, in discharging the petitioner, said:

"To permit an indiscriminate search among all the paper's in one's possession for no particular paper, but some paper, which may throw some light or some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the criminal code.* Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Here there was nothing before the Circuit Court showing the necessity for the subpoena. Its necessity could not have been shown since there

*The application for the subpoena stated that the telegrams were "needed as evidence and are material in certain matters now pending before the Grand Jury," &c. There was no question raised as to the inquisitorial power of the Grand Jury (72 Mo., p. 87).

was no cause pending. The papers called for were neither described, nor was there anything to indicate their relevancy to any matter of which the Court might have taken cognizance. In these circumstances it is plain that the issuance and service of the subpoena upon the appellant was an unwarranted and arbitrary interference with his personal liberty and assault upon his right of privacy, and that he was under no obligation to obey it.

(c.) The papers mentioned in the subpoena being the property of the MacAndrews & Forbes Company, and in the petitioner's temporary custody solely by reason of his official relations toward that corporation, the compulsion of the subpoena would have constituted an unreasonable search for and seizure of the papers and effects of the corporation; and would, moreover, have compelled it by indirection to furnish evidence against itself in a criminal case, in violation of its constitutional rights.

A corporation cannot be compelled to furnish incriminating evidence against itself and it is entitled to the same immunity in this regard which the common law and our Constitution accord to private individuals.

In *United States v. General Paper Co.*, now on appeal to this Court, the Circuit Judge of the District of Minnesota seems to have regarded the question as a mooted one, although he says:

"I am inclined to the view that the constitutional provision, if broadly construed, as it should be, includes corporations."

Professor Wigmore in his recent work on Evidence (Sec. 2259, Vol. 3, p. 3116), however, thus broadly states the proposition:

"It is also plain * * * that a corporation when discovery is sought from it as such, is to be equally protected from disclosure, so

far as it is capable of committing a criminal act."

Citing

King of Sicilies v. Wilcox, 7 St. Tr. (N. S.), 1049, 1062.

Logan v. Penn. R. Co., 132 Pa. St., 403, 408.

In the former case the English Court of Chancery held (per Shadwell, V. C.), that a corporation was not privileged from making disclosures under a bill in chancery alleging a violation of the Foreign Enlistment Act, but the Vice-Chancellor based his ruling upon the express ground that the corporation was not indictable under the act.

In *Logan v. Penn. R. Co.* (*supra*), the Court below refused to grant an order for the production on the trial of books and papers in the defendant's possession in so far as it was sought by them to establish a liability of the defendant to the plaintiff for a penalty imposed by an Act of Assembly, saying (p. 408):

"We have carefully considered the position taken by the plaintiff's counsel at the reargument that we may require the defendant corporation to produce the required writings, even though a natural person in a like case could not be called upon for their production. We are not able to agree with the reasoning. We think the rules of evidence and the rules of law for the production of writings are essentially the same, whether the defendant is a natural or an artificial person."

The appeal was quashed, the order being merely interlocutory.

See also *Davies v. Lincoln National Bank*, 4 New York Supplement, 373, where, in an action to subject a corporation to a penalty, an order for the examination of its president, requiring him to produce its books, was vacated on the ground that the corporation could not thus be forced to produce evidence for the purpose of subjecting it to a penalty.

Perhaps other citations could be made from authors of text books or treatises on the Constitution, but a fairly diligent search does not show other adjudications sustaining, and none denying, the proposition that corporations are entitled to the protection of the Fourth and Fifth Amendments. The proposition seems to us certainly sound in principle. So far as the right of privacy is concerned—the right to have one's private papers secure from unreasonable search, without reference to their incriminating nature—we can see no reason why the fact that individuals see fit to carry on certain of their business under lawful corporate form, should deprive that corporation—and therefore them—of the right of privacy with respect to that business. So far as the right to be protected against the search of its papers for the purpose of incrimination is concerned,—it seems to us manifest that where there exists criminal liability there must exist also constitutional guarantee against the compulsory production of self-incriminating evidence. There does exist a criminal liability against the corporation whose papers are thus sought to be compulsorily produced for examination by the express terms of the Sherman Anti-Trust Law.

There are other considerations that induce the same conclusion. This Court has repeatedly held that a corporation is a "person" and protected by the Fourteenth Amendment, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." (*Santa Clara County v. R. R.*, 118 U. S., 394; *Mining Co. v. Pennsylvania*, 128 U. S., 181.) One finds it difficult to conceive how one can be a "person" under the Fourteenth Amendment and not one of the "people" under the Fourth Amendment. While the question here presented—to wit, the rights of corporations under the Fourth Amendment—has never before been presented to this Court, we find the conclusion inevitable that the same reasons

that induced the Court to hold, when the question was an open one, that corporations are included in the word "person," and are protected against the unlawful acts of States, will also induce the holding that they are included in the word "people," and are protected against the unlawful acts or attempts of the Federal Government. The Fourth Amendment and the Fourteenth protect rights of the same kind—rights that the world has come to believe are the most prized possession of Anglo Saxons. They both protect rights of the kind referred to by Mr. Justice Harlan when he said (*Dis. of Hawaii v. Maukichi*, 190 U. S., 197, 236):

"In my judgment neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States."

Of course, a corporation can only be examined through its officers, directors or agents. In the present case the Government undertook deliberately by that method to compel the corporation to submit to examination, not as a witness to be sure, but through the subterfuge of forcing one of its officers and directors to produce its books and papers before the Grand Jury under the coercion of a subpoena; and this for the sole purpose of ascertaining by the examination and inspection of these books and papers, whether or not the corporation had committed a crime for which it was indictable under the Sherman Act.

The rule relied upon by the Government that the protection of the Fourth and Fifth Amendments is the personal privilege of the witness and cannot be claimed for the benefit of another has no possible application to the case of an officer, director or agent

of a corporation who seeks to secure to the corporation its constitutional rights and immunities; for these rights can only be asserted through its officers, directors and agents.

In this view the witness is not seeking to invoke the privilege of another, but the corporation itself invokes its own privilege in the only manner and by the only means it can employ for that purpose. The appellant, when called before the Grand Jury, was there in no individual or personal capacity, but was to all intents and purposes, the corporation itself which, through him, merely asserted its legal rights. If it cannot so assert them, it can never assert them at all.

If, under these circumstances it could be said that the corporation was a witness, and, therefore, entitled to the immunity afforded by the statute, this might, perhaps, meet our present contention. But the position of the Government is that the corporation is not protected by the statute. Its avowed purpose is to use the papers as the basis of an indictment against the corporation; and its argument in support of its right so to do is that the corporation is not a witness, and therefore cannot plead privilege, that its officer, who is a witness, can plead only his personal privilege, and not the privilege of the corporation, which is a separate entity, and that as the corporation has no privilege it has no immunity. The Government further argues that by whatever means the corporation's papers are brought into Court, whether rightful or wrongful, when they are once there they may be used in evidence, and that the corporation cannot object to their use even though they are intended to be made the basis of an indictment against the corporation.

The Government in the Circuit Court cited, in support of their contention that the constitutional privilege against self-incrimination in the case of an agent of a corporation called as a witness was per-

sonal to the witness as distinguished from that of the corporation, the following cases:

New York Life v. People, 195 Ill., 430.

U. S. Express Co. v. Henderson, 69 Iowa, 40.

In re Peasley, 44 Fed. Rep., 271.

In re Moser, 101 N. W. Rep., 588.

These cases fairly sustain this general proposition that the privilege under the Fifth Amendment is personal to the witness. He also invokes the last three authorities cited for the proposition that the agent of a corporation cannot refuse to produce its books and papers on the ground that their production would criminate the corporation and that a subpoena calling for their production is therefore void under the Fourth Amendment.

An examination of these cases shows that they sustain no such proposition.

In the *Henderson* case the witness did not refuse to answer on the ground that the subpoena to produce the papers of the corporation was in violation of the Fourth Amendment, but merely that he was privileged from producing them under a provision of the Iowa code excusing a witness from answering when the matter sought to be elicited will render *him* criminally liable. It was argued that the witness and the corporation were identical. The Court held, however, that the fact the witness' employers had taken on a corporate character did not identify them with the witness so as to give the corporation the privilege pleaded. The right of the prosecuting power to extort incriminating evidence from a corporation by means of a subpoena *duces tecum* addressed to one of its employees, in violation of the Fourth Amendment, was not presented or considered.

If it is true as held in the *Henderson* case that the corporation cannot plead the Fifth Amendment on the ground that through its officers it has become a witness, then it is clear that

the Act of February 25, 1903, gives it no immunity, for that act is directed to the protection of witnesses, and not to the protection of mere owners of incriminating documents.

Indeed, in *re Pooling Freights*, 115 Fed. Rep., 588, Hammond, J., in charging a grand jury, said that although corporations were indictable under the Interstate Commerce Law, the immunity clause of the Act of 1903

"does not grant immunity from indictment and prosecution to a corporation even though its officers or agents have been compelled to appear before the Grand Jury and testify to facts which would tend to criminate it, or produce books and papers of the corporation bearing upon the offense of which it is charged."

In the *Peasley* case both the Fourth and Fifth Amendments were pleaded, but Gresham, J., held that the Fourth Amendment did not apply because corporations acting as common carriers between States are not liable criminally for violations of the Interstate Commerce Act, nor are they exposed to its penalties and forfeitures.

In the *Moser* case the privilege pleaded was that the incriminating papers had been subpoenaed for the avowed purpose of obtaining evidence against other officers of the corporation—not against the corporation. It was held that the books belonged, not to the officers, but to the corporation, and were in its possession, and that the witness could not object any more than the corporation could to the production of the corporate books for the purpose of incriminating, not the corporation, but its officers. The Court said, per Grant, J. (p. 592):

"No private individual can be compelled to produce his books or papers for the purpose of affording evidence against himself in a criminal prosecution. Neither can the subterfuge of subpoenaing his clerk, who has access to, or temporary possession of, the books for

the purpose of his employer's business, he resorted to to compel a production of the books. The possession of the clerk in such case is the possession of his employer. The books of a corporation are not the private property or books of petitioner or any other officer of the company. The corporation is a distinct entity. * * * We think the rule is this: One can not be compelled to produce his own books, or the books of another which are under his control as agent or otherwise, where their production would tend to criminate him; *neither can his clerk, whose possession is his possession, be required to produce them*; but when, as the agent of another, he chooses to make entries on the books of that other, and those books are in the actual and legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them *in a proper case under a subpoena duces tecum.*"

It is not a "proper case," as pointed out in this opinion, where an employee of a corporation whose possession is its possession, is called upon to produce papers for the purpose of furnishing a basis for the indictment of the corporation.

This is simply an application of the rule laid down in the *Boyd* case, the authority of which has never been impaired.

In *Interstate Commerce Commission v. Brinson* (154 U. S., 447, 479), the Supreme Court said:

"We said in *Boyd v. U. S.*, and it cannot be too often repeated, that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacy of his life."

In *Adams v. New York* (192 U. S., 585, 597) the Court said, with reference to it:

"The case has been frequently cited by this Court, and we have no wish to detract from its authority."

We theremore submit with great confidence that the cases cited by the government, as well as the *Boyd* case, establish the proposition that the subpoena in this case was an instrument devised for the accomplishment of an unreasonable search and seizure within the spirit and meaning of the Fourth Amendment, unless contrary to the contention of the Government, and contrary to the holding in the *Anderson* and *Pooliny Freights* cases (*supra*), a corporation against whose officers such a subpoena is enforced becomes thereby a witness, and is therefore entitled to the immunity afforded by the act of 1903. We do not understand that this point was at all involved in the *Baird* case (194 U. S. 250). It considered the Fourth Amendment only in regard to the witness, and not with respect to the corporation whose officer he was.

If the corporation is entitled to immunity, the Government is engaged in an utterly idle proceeding, namely, in an endeavor to secure an indictment of a corporation upon evidence, the production of which bars the indictment.

Are our Constitutional safeguards against self-incrimination more infirm than those furnished by the common law? In former times it was thought a startling proposition that a corporation could be called upon to furnish evidence against one of its members. Here a corporation is sought to be compelled by indirection to furnish evidence against itself.

In *Rex v. Purnell, Wilson*, 239, the Attorney-General, who had exhibited an information against the defendant for a misdemeanor and misbehavior in the neglect of his duty, both as Vice-Chancellor and Justice of the Peace of the University of Oxford, moved for liberty to inspect the statutes of the University, which were kept by a proper officer called *Custos Archivorum*, whereby it would appear what was the duty of the Vice-Chancellor.

Counsel for the defendant objected that what was asked was

"contrary to the well known maxim of law, that no man is obliged to accuse himself, and more especially in a criminal prosecution, as this is. Doctor Purnell, a single member of the University, is prosecuted in a criminal matter; the like rule might as well be prayed in the case of an indictment of any other member or scholar; or if any one citizen of London was prosecuted, the like rule might as well be prayed to inspect the books, papers and archives of the city, which no young gentleman who attends this bar will be so weak as to move."

And further:

"Supposing the defendant has these statutes in his custody, he is only a trustee for the corporation, and whatever crime he may have been guilty of, that cannot affect the University; * * * and if this Court was to make this rule absolute, it will (instead of doing justice) lay a foundation for something like an *inquisition of state*, for this Court sits to *hear* evidence, not to *furnish* it."

Counsel for the Crown insisted that the *public justice* of the nation was concerned, that the Crown gave the statutes whereby the Vice-Chancellor was to govern himself and be governed, that the King had a right to see them, that it might be known and seen *whether* he had so done.

Chief Justice LEE, delivering the opinion of the Court, said:

"We are all of opinion that we cannot make this rule absolute, and found that opinion upon former cases, but think *this* is a much stronger case than any of them. The only case cited for the King upon the motion for this rule was *Rex v. Berkett* or *Berking*, which was an indictment for exercising a trade, not having served an apprenticeship; application was made that the prosecutor might be named; the court could not do *that*, but said 'You may have a rule to take a copy of the record,

and then you will see upon the back side of the indictment who the prosecutor is; they had certainly a right to a copy of the record below, and if refused, this Court would have granted a rule, but this is not to the present purpose. The case to the present point is 2 Ld. Raym., 927. The *Queen v. Mead*, 2 Anne, where the reason given for refusing the rule was the maxim mentioned at the bar, '*That no man is bound to accuse himself.*' Another strong case was in this Court. Trin. 17 & 18, Geo., 2, *Rex v. Cornelius* of Ipswich. An information was filed against him and another justice of peace for exacting money from persons for licensing alehouses; it was moved by the prosecutor for leave to inspect the corporation books; a rule was made to show cause in the usual terms to inspect the papers, books and records of the corporation; and upon showing cause it was very strongly debated on both sides by Sir John Strange and Sir Richard Lloyd, and all the cases cited then that have been now cited, before the rest of my brethren (myself absent), time was taken to consider, and I had a conference with my brothers, and we all agreed the rule could not be granted, because it was a criminal proceeding, and that the motion was to make the defendants furnish evidence against themselves; the present case is rather stronger, because it is a prosecution for a *crime of a more public nature*, for unless it be *such*, this Court has no jurisdiction. And this is unlike a *quo warranto*, for that is a right granted by the Crown, and the public books and records are the proper evidence on both sides. Rule discharged."

CONCLUSION.

The order dismissing the writ should be reversed, and the petitioner discharged.

DE LANCEY NICOLL,
JUNIUS PARKER,
JOHN D. LINDSAY,
Of Counsel for the Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1905.

Nos. 340 and 341.

EDWIN F. HALE,
Appellant,

AGAINST

WILLIAM HENKEL, United
States Marshal in and for
the Southern District of New
York.

Appellant's
Brief in Reply.

WILLIAM H. MCALISTER,
Appellant,

AGAINST

SAME.

First.

The propositions presented in the First and Second Points of our main brief are that there was nothing in the record before the Circuit Court from which it could see and determine (*a*) that the Grand Jury was engaged in any investigation or inquiry which it had authority to pursue, or in respect to which the oral and documentary evidence sought to be compulsorily extracted from the appellant was pertinent or material; or (*b*) that there was any judicial matter pending at the time such evidence was demanded of the appellant.

Second.

(a) The existence of the "present day *notion*" in respect to the practically unlimited inquisitorial powers of Grand Juries is admitted. We by no means admit its "general adoption."

(b) In the *Counselman* case this Court found it unnecessary to intimate its opinion as to the question referred to in that portion of the opinion quoted by counsel for the Government,

"or as to the question whether the reports of the Grand Jury * * * are or are not consistent with the fact that they were investigating specific charges against particular persons;"

(c) Seemingly our learned opponents fail to grasp our real contention in respect to the legitimate function of a Grand Jury. We do not dispute the power and right of the "Executive Department, through the medium of the Department of Justice," or otherwise, to lend its aid to a proper Grand Jury investigation, by "presenting for the consideration of that body *facts*" tending to establish the violation of a federal statute (Government's Brief in Reply, p. 3.) On the contrary we agree with them that:

"only *accusing* witnesses; that is, witnesses who have knowledge of *facts* tending to show that *the person under investigation has been guilty of a crime*, are called before the Grand Jury, and it is upon such evidence that that body is called upon to decide whether there are 'probable grounds' that anybody has been guilty of any particular crime" (*Id.*, pp. 4-5).

We further concede the soundness of the proposition that

"It has been, and it must be, that a Grand Jury is authorized to proceed whenever matters come to their attention from which there arises a greater or less probability that there has been a violation of the law" (*Id.*, p. 5).

In such cases there are present all the elements necessary to the proper exercise of the Grand Jury's legitimate function, viz.: *parties*, namely an accuser and an accused (named or unnamed, known or unknown), *a matter in controversy*, namely the existence or non-existence of probable cause to believe the accused guilty of acts constituting a violation of law. There is the *allegation or assertion*, in some form (it matters not how or by whom made; *Frisbie* case, 157 U. S., 160) that some one has committed an *act* which constitutes a crime. This is the *issue* which the Grand Jury is to *judicially* determine.

(*d*) Statutes requiring Grand Juries to be specially *charged* to inquire into particular classes of offenses merely call for especial vigilance in respect to those offenses. They in no way enlarge the jurisdiction of Grand Juries, or confer "inquisitorial" power—that is, power to embark upon voyages of discovery for the purpose of finding out whether some one may not, perhaps, have committed such an offense. If, however, such statutes were to be construed as extending the powers of Grand Juries so as to authorize general inquisitions it would necessarily follow that without them that authority does not exist. There is, of course, no federal statute of this character involved in the case at bar.

(e) No judicial body can act or proceed in any manner in the absence of an allegation showing the existence of *facts* justifying its intervention.

In *Matter of Peck v. Cargill*, 167 N. Y., 391, it was held that Section 28 of the New York Liquor Tax Law (Chapter 112, Laws of 1896), authorizing any citizen to commence summary proceedings by petition to forfeit the right to carry on business on account of a violation of the act, but expressly requiring that the "petition shall state the fact upon which said application is based," was not satisfied by an allegation that the petitioner was informed and believed that the particular facts existed, or that the party charged had committed a violation of law, and that such a petition furnished no basis for any judicial action. The Court of Appeals said, per O'Brien, *J.*:

A special statutory requirement that a party must state certain facts as a basis for an order revoking a certificate of the right to carry on a certain business, is not satisfied or complied with by a mere statement that the moving party suspects or is informed and believes that the particular facts exist, or that the party charged has committed the forbidden acts in violation of law. This principle would seem to be specially applicable to a case like this, where the acts charged and which are at the foundation of the proceeding, not only subject a party to a penalty or a forfeiture, but are also crimes, and punishable criminally. The statute now under consideration authorizes the Judge, upon presentation of a petition stating the facts, to grant an injunction against a transfer of the certificate and an order to show cause. The petition does not confer jurisdiction unless it is in compliance with the statute, and a *petition in which all the material facts are stated upon information and belief, without disclosing the sources of the in-*

formation or the grounds of the belief, is no sufficient basis for any judicial action" (pp. 393-4).

In *Matter of Davies*, 168 N. Y., 89, the same court upheld a statute requiring any justice of the Supreme Court, upon application of the Attorney-General, whenever the latter has determined to commence an action under the Donnelly Anti-Monopoly Act (Laws of 1899, ch. 690; Birdseye's Rev. St. of N. Y., 3d Ed., p. 2405; See our main brief, p. 61) to grant an order for the examination before such justice, or a referee to be appointed by him, of persons whose testimony is material and necessary, *because*, as Vann, J., said, "the expression in the statute * * * do not deprive him of the power to decide whether *upon the facts alleged* the order should be granted." Continuing the learned Judge said:

"The statute is not satisfied by a single *statement of the Attorney-General* in his petition that he is *informed and believes* that the testimony of such persons is material and necessary, but he must show *how and why* it is material and necessary. This involves the general nature and object of the action that he has determined to bring. A determination to bring an action, indefinite and undefined, is not what the Legislature contemplated, but *one*, the general character of which is described sufficiently to show that it is *founded upon the statute, as well as upon probable cause*, and that the testimony of the witnesses will be material and necessary therein. Thus the Justice is called upon to exercise the judicial function of deciding whether the application conforms to the statute as thus construed, the same as is required of him when an application is made for an order of arrest, a warrant of attachment or any other provisional remedy" (p. 103).

A case even more in point, if possible, is that of *People ex rel. Sandman v. Tuthill*, 79 New York App. Div., 24. There the relator was examined on oath as a witness before a justice of the peace, in a proceeding based upon an information charging on *information and belief*,

"that on or after the 1st day of May, 1901, at the town of Riverhead, in said County of Suffolk, one David Sandman and other persons of said town of Riverhead, County of Suffolk, did commit the crime of misdemeanor, in that they did at the time and place above named, unlawfully, wilfully and knowingly violate the Liquor Tax Law of the State of New York" (p. 25).

Sandman was committed for contempt by reason of his refusal to answer a certain question on the ground that it might tend to incriminate him. He was, of course, promptly released on *habeas corpus*; but the Justice continued to take testimony under the information, whereupon Sandman obtained from the Special Term an absolute writ of prohibition restraining the Justice from issuing any further compulsory process.

In unanimously affirming the order allowing the writ the Appellate Division of the Second Department (January, 1903) said, per Woodward J.:

"To make a general allegation that some one has been guilty of a violation of the Liquor Tax Law, a general statute providing the details regulating the sale of intoxicating liquors, and then to permit a general inquiry of the defendant and others as to the entire details of the conduct of the liquor business, would be an act so entirely hostile to our system of jurisprudence as to shock the sense of justice of English speaking people generally. It would be, in effect, to make a man his own accuser, and to subject every detail of his business to ju-

dicial investigation at the whim or caprice of every person in the community. The statute may serve a useful purpose within reasonable limits, but to give it the construction demanded by the appellant is to make it an instrument of petty persecution, having no sanction in our system. The information must set forth that 'a crime' has been committed in order that the magistrate shall have jurisdiction, and we are clearly of opinion that the information before the justice in this proceeding did not meet the requirements of the law" (pp. 25-6).

(b) The learned counsel for the Government argue that "considerations of sound public policy demand that inquisitorial power shall be exercised by the Grand Jury, particularly in a matter of wide public interest, that "in a matter where from the nature of the offense a large portion of the public is interested or involved" (*e. g.*, riots and conspiracies) the grand jury, in the exercise of a power which is described as "a survival of the ancient practice of the early grand juries which acted upon mere rumor" can to-day "investigate on the suggestion of the prosecuting attorney," and that "if it is necessary in order to effectually investigate the so-called Tobacco Trust to deal with its *supposed* violation of the Anti-Trust law as a matter of public notoriety, the Court should aid the government in so doing." (Brief for the United States, pp. 52-3.)

And what is the justification for the application of this startling theory? Nothing more nor less than the Attorney General's assertion, *de hors* the record, that

"By *legal* or illegal means that *trust* has a practical monopoly of the tobacco trade."

If it be true that the American Tobacco Company has accomplished such a result *by legal means*, it

has violated no law. The Attorney General, although he *supposes* otherwise, confesses that he has *no probable cause* for so alleging.

Carried to its logical conclusion, this argument would authorize a Grand Jury investigation into the private affairs of every individual who has amassed a fortune by the development and extension of a successful business enterprise. Every such individual has gained his wealth by "*legal or illegal means.*" Without doubt many people *suppose* his methods have been, and perhaps must have been, illegal; if so he has violated *some law*, Federal or State. His methods have thus become a "matter of public notoriety," and a zealous, or indeed any prosecuting attorney, should therefore "effectually investigate" his business life and affairs by calling his employees, his friends and his family before the Grand Jury and questioning them with a view to discovering whether or not the general *suspicion* is well founded.

Our learned adversaries misapprehend the doctrine they invoke. Where from *known facts* there is reasonable ground to believe that a crime has been committed, whether it be "a matter of public notoriety," or the pettiest transgression of law, the Grand Jury may initiate an investigation directed against the *perpetrator of the act*, be he named or unnamed, known or unknown. Then there is a charge, based upon an allegation of fact, an accused, even though his identity be unknown, and a proper subject matter for investigation and determination. Until then there is no occasion or warrant for a Grand Jury inquiry.

(g) With the exception of the few cases to which we shall presently allude, all the authorities cited by the learned counsel for the Government are directly in accord with our contention. Upon anal-

government that the construction of the act of February 25th, 1903, for which we contend would defeat the obvious purpose of the Sherman Law is conclusively answered by the provisions of the act approved eleven days earlier, February 14th, 1903, entitled "An Act to Establish the Department of Commerce and Labor." By the Act of February 14th, 1903, a "Bureau of Corporations" was established, with a "Commissioner of Corporations" as its head, and it was provided in section 6 as follows:

"The said Commissioner shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct and management of the business of any corporation, joint stock company or corporate combination engaged in commerce among the several States and with foreign nations excepting common carriers subject to 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

"In order to accomplish the purposes declared in the foregoing part of this section, the said Commissioner shall have and exercise the same power and authority in respect to corporations, joint stock companies and combinations subject to the provisions hereof, as is conferred on the Interstate Commerce Commission in said 'Act to regulate commerce' and the amendments thereto in respect to common carriers so far

as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said 'Act to regulate commerce' and by 'An Act in relation to testimony before the Interstate Commerce Commission,' and so forth, approved February eleventh, eighteen hundred and ninety-three, supplemental to said 'Act to regulate commerce,' shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section."

This Act of February 14th, 1903, made it the duty of the Commissioner to make "diligent investigation into the organization, conduct and management of the business of any corporation," etc. It provided that the "information so obtained or as much thereof as the President shall direct shall be made public," and it armed the Commissioner with power to "compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths." It gave to the witnesses examined by the Commissioner immunity from prosecution, and thereby took from them their constitutional privilege to refuse to answer self-criminating questions.

It is idle to argue that any purpose of the Sherman Law would be defeated by the construction of the Act of February 25th, 1903, for which we contend, when eleven days before its passage the executive branch of the government had been given in the Act of February 14th, 1903, this drastic means for acquiring and disseminating information and evidence concerning the management of the business of every corporation (other than common carriers) engaged in interstate commerce.

Fourth.

The Fourth and Fifth Amendments.

At the root of the discussion under this point lies the question whether corporations enjoy the protection of the Fourth and Fifth Amendments.

THE FOURTH AMENDMENT:

"The right of the People to be secure in their persons, houses, papers and effects against unreasonable search and seizures shall not be violated, and no warrants shall issue but upon probable cause supported by other or affirmation, and particularly describing the place to be searched and the person or things to be seized."

THE FIFTH AMENDMENT:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

In both the Hale case and the McAlister case, the criminal proceeding was not aimed at the individuals, but at the McAndrews & Forbes Company and The American Tobacco Company in the former case, and The American Tobacco Company and The Imperial Tobacco Company in the latter. Under the provisions of the Sherman Act, these corporation defendants were liable to indictment for a crime, and if a charge against them was sustained to conviction and sentence.

By another section of the same act they were liable to forfeit, if guilty, a large part if not all of the corporate property.

By the eighth section of the same Act, *person or persons* where used in this act, shall be deemed to include *corporations and associations*.

In view of these provisions we do not perceive how it is possible to adopt a construction of these Amendments which shall exclude corporations from their operation. As is pointed out upon the main Brief, all of the authorities support the view that they are included, and with good reason. For if corporations may suffer the judgment of death by dissolution (*People v. N. R. Sugar R. Co.*, 121 N. Y., 582; *No. Securities Co. v. U. S.*, 193 U. S., 197), if they may be condemned to forfeit the corporate property, if they may be indicted, convicted and sentenced to pay a fine as individuals may, what excuse can be made for denying to them the beneficent protection of these amendments.

All analogous cases favor this construction. In *Gulf, Colorado and Santa Fe Ry. vs. Ellis*, 165 U. S., 154, the Court after declaring that corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States (citing numerous cases), proceeded as follows:

"The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can in respect to the individuals who are the equitable owners of the property belonging to such corporation. A State has no more power to deny to them the equal protection of the law than it has to individuals."

A corporation is a *citizen* under the provision of the Constitution, which gives Courts of the United

Fourth Amendment, and which was so lucidly expounded by Mr. Justice Bradley in *U. S. vs. Boyd*.

The only justification for requiring a man to leave his home and bring his papers to a court is that they are *relevant* to some issue embraced in a pending judicial proceeding. There is no other excuse for compelling their production. That was the precise point upon which the Court based its decision in *Interstate Commerce Commission v. Baird*.

In the *Hale* case, not only was no particular paper or papers called for by the subpoena, but there was no charge pending before the Grand Jury as to which any paper could be said to be relevant. The very vagueness of the proceeding would have made the claim of relevancy groundless.

The compulsory search and seizure of the papers in the *Hale* case was unreasonable also because the subpoena referred to no specific paper or papers, but required the production of every sort and kind of writing which the company had ever acquired in the course of its business from the beginning of its corporate life. The law of privacy tolerates no such practice. One who is called upon to produce papers which are relevant to an issue in a judicial proceeding is entitled to have the papers sought for pointed out with something like definiteness, in respect to time, description, character and contents. The subpoena in the *Hale* case lacked all of these requisites and under the most liberal construction of the rules applicable to such process was altogether improper and unlawful. That was one of the reasons which induced Judge Wallace to speak of it as a "wanton assault upon the right of privacy."

The McAlister subpoena.

The *subpoena duces tecum* in this case is not open to the strictures upon the Hale subpoena which we have just made. Before the Grand Jury in that case there was, in the language of the Assistant District Attorney, "a complaint and charge made in behalf of the United States of America against The American Tobacco Company and the Imperial Tobacco Company under the so-called 'Sherman Act' " (p. 12).

While the record is silent as to the matter complained of, yet we may assume that there was in fact some specific charge to which the papers called for by the subpoena were relevant, and so far from demanding the production of all the writings of the defendant company, the subpoena pointed out the particular writings sought for, giving in each case the date, the names of the parties, and in one instance a suggestion of the contents.

So far there was nothing in the subpoena upon which the claim of an unreasonable search and seizure might be made.

BUT IN BOTH CASES, McALISTER AS WELL AS HALE, THE SUBPOENA DUCES TECUM REQUIRED THE RESPECTIVE DEFENDANT CORPORATIONS TO PRODUCE EVIDENCE TO BE USED AGAINST THEM IN A CRIMINAL ACTION OR PROCEEDING IN WHICH THEY WERE NAMED AS DEFENDANTS, AND IN BOTH CASES THE SECRETARY OF THE COMPANY WAS COMMITTED TO JAIL FOR REFUSING TO PRODUCE FOR SUCH PURPOSE THE PAPERS AND WRITINGS BELONGING TO HIS COMPANY OF WHICH HE WAS THE CUSTODIAN.

Such compulsion of itself amounted to an unreasonable search and seizure. The characteristics of the Hale subpoena were only "circumstances of aggravation."

If as we contend corporations are entitled to the protection of the Fourth and Fifth Amendments, how shall their claim of privilege be asserted?

There is but one method, and that is out of the mouth of the officer who, as the custodian of a corporation's papers, is called upon to produce them for use against his company, or who is required to give oral incriminating evidence concerning matters which have come to his knowledge in the course of his employment as one of the company's officers or agents.

Here the corporation's claim of privilege to the protection of the Fourth and Fifth Amendments was asserted by their respective officers,—in the *McAlister* case expressly (pp. 2 and 12), and in the *Hale* case by necessary implication (p. 4).

The personal privilege of the witness may be one entity, the corporation's privilege may be another, but unless the corporation can assert its privilege through its representative, how can it ever assert it at all?

As we have pointed out upon our main brief, this is the method which has always been adopted where a corporation insisted upon being protected from giving evidence, documentary or otherwise, to be used against itself in any proceeding for a penalty or forfeiture.

We cite also *State ex rel. Wood v. Simmons*, 15 L. R. A., 676.

That was an information in the nature of a *quo warranto* to annul the charter of *Simmons Hardware Co.*, a Missouri corporation. The information charged the defendant company with having violated the Missouri Statute of 1889 relating to pools and trusts. (Mo. Sess. Acts 1889, p. 97.) By the terms of this Statute, Missouri corporations were prohibited from merging all or any part

of their business or interests in or with any trust, combination or association of persons, etc.

According to Section 6, a corporation violating this provision forfeited its corporate rights and franchises, and its corporate existence ceased and determined. It was also punishable by a fine of not less than one or more than twenty per cent. of its capital stock or amount invested. The President, Treasurer or any director of the corporation was required to make answer under oath as to whether the company had ever been guilty of a violation of the act, and on a refusal to make such oath, the Secretary of State was required to immediately revoke the company's charter. The officers of the corporation were also punishable by fine and imprisonment.

The information charged the defendant with having violated this act (1) in having become a member of certain pools, trusts, &c., and (2) in having failed or refused to make answer through its officers under oath as to whether it had merged its business, &c.

The answer denied the first charge and as to the second insisted that to demand of one of its officers an answer under oath to an official inquiry which might form the subject of a criminal accusation against him was an infringement of his right *and of the rights of the corporation* as well under the Fifth Amendment of the Federal Constitution as well as under the Constitution of Missouri.

The case was considered only with reference to the Missouri Constitution "that no person shall be compelled to testify against himself in a criminal case."

In declaring the statute unconstitutional and directing judgment for the defendant, the Court said:

"The third section involves a penalty
"(in event of a violation of the terms

"of the act) of a fine of not less than
 "1 and not more than 20 per cent. of the
 "capital stock against the corporation and
 "another penalty of fine and imprisonment
 "upon the officers required by section 6 to
 "make answer under oath. The corporation
 "as well as its managers would be thus liable
 "to a forfeiture of goods and the officers to
 "imprisonment should they be forced to dis-
 "close a breach of law on the part of the
 "corporation."

"If, on the other hand, they held their
 "peace (as the Constitution permits even the
 "greatest offender to do), Section 6 of the
 "Act purports to sanction as a penalty for
 "so doing the immediate revocation of the
 "corporate charter. It seems to us very clear
 "that such attempted legislation is out of
 "harmony with the true spirit and purpose
 "of the constitutional language quoted."

The Immunity Statute.

The corporations having asserted their privilege against being compelled to give incriminating evidence, and their respective officers having been committed to jail for refusing to produce the corporate papers or to testify against it, a clear case of unreasonable search and seizure of the corporation's property is made-out in the *McAlister* case, as well as in the *Hale* case, unless the Immunity Statute of February 25, 1903, is applicable.

Of course if that is applicable, if corporations as well as individuals are within its scope and meaning the claim of an unreasonable search and seizure disappears, so far as the incriminating character of the papers are concerned (as was held with respect to *individuals* in the *Baird* case), although in the *Hale* case the unreasonable search and seizure would still exist for reasons already stated.

Now, it is contended with great earnestness by

our opponents that corporations have no immunity under the Statute, and as evidence upon this point they refer to the Elkins Act, passed February 19, 1903 (32 Statutes, L. 848), which they contend indicates the intention of Congress to deny immunity to corporations while extending it to natural persons.

It is unnecessary for us here to discuss whether in view of this distinction this act of Congress is constitutional or not. All that need be said in reply is that if Congress has not provided in the immunity Statute of February 25, 1903, a substitute for the privilege which corporations possess under the Fourth and Fifth Amendments, then their constitutional rights are not affected and they remain in the full enjoyment of them.

If a corporation is not within that statute, then surely it may refuse to produce its books and papers to be used as evidence against it in a criminal case.

If a corporation is not within that statute, it surely may decline, through its officers, to testify against itself in a criminal case, just as a corporation defendant in a bill of discovery might decline through its officers to answer self-criminating interrogatories.

Our view has been that the immunity statute is broad enough to include corporations as well as individuals. It provides that no *person* shall be prosecuted or subjected to a penalty, just as the Fifth Amendment declares that no *person* shall be compelled in any criminal case to be a witness against himself. This immunity statute is an auxiliary of the Sherman Act, and is really a part of it. And the Sherman Act declares that the word PERSON OR PERSONS shall include CORPORATIONS.

It is argued, however, that a corporation is not

intended by the statute because it may not "testify," although, of course, it may "produce evidence documentary," and that the *language* of the statute shows that its immunity is restricted to natural persons.

We reply that there are two ways in which a corporation can be compelled to be a witness against itself in a criminal case.

One way is to compel its officer by actual imprisonment until he complies to produce the papers of the company. Another way is by calling its officer and extracting from his lips information concerning his company's affairs which he has acquired in the course of its service.

In both instances, probably, and surely in the latter, the corporation may be said to "testify." It speaks through its officer. When he is testifying the corporation is testifying.

If, however, as our opponents contend, the language of the immunity statute, and the inferences to be drawn from the Elkins Act and the act creating the Bureau of Corporations, both passed at the same session of Congress as the immunity statute which we are now considering, indicate that Congress did not intend to give immunity to corporations, then we reply that the statute is plainly defective and that until it is amended so as to include and protect corporations, their constitutional rights under the Fourth and Fifth Amendments are in no wise disturbed. Nothing is needed to clear up the matter but a brief amendment to the effect that a corporation testifying through its officer, or, in like manner, producing books and papers, shall be entitled to the same immunity as is given to individuals.

The Government complains that if corporations are within the immunity statute, then the criminal action against the McAndrews and Forbes Co. in the Hale case, and against The American Tobacco

Company in the McAlister case, will fall to the ground. That, of course, will be the result. But the action against the other defendant corporation, who was not called upon to testify or produce evidence against itself, might survive, and, therefore, the prosecution would not be in vain. And the Government is as well off in this respect as prosecutors usually are who undertake to prove any conspiracy, where the common practice is to call upon one defendant to lay the foundation of the case against the other.

And finally it is contended that even if there was an unlawful search and seizure of the corporation's papers in both cases, yet the witnesses, Hale and McAlister, should have answered the oral questions put to them before the Grand Jury.

Our answer is that if the corporation is not given immunity, the *extraction* of incriminating testimony from its officer would be to compel it to be a witness against itself, quite as much as if its books and papers were, by compulsion, produced against it.

The officer of the corporation stood before the Grand Jury in a dual relation. He was there as an individual. He was also there as the representative of the corporation. He was interrogated about its doings and its affairs. It was not enough that the statute gave him immunity as an individual. The constitutional right of the corporation to be protected against being compelled to be a witness against itself would still be violated unless immunity for it was also provided by the statute.

January 9th, 1906.

DELANCEY NICOLL,

JOHN D. LINDSAY,

Of Counsel for Appellants.

Supreme Court of the United States,

OCTOBER TERM, 1905.

EDWIN F. HALE, APPELLANT,

v.s.

WILLIAM HENKEL, United States Marshal
in and for the Southern District of New
York.

} No. 340.

ARGUMENT FOR APPELLANT.

MAY IT PLEASE YOUR HONORS:

This is an appeal from an order made by Circuit Judge Wallace dismissing a writ of *habeas corpus* sued out by the appellant, and remanding him to custody. The appellant has appeared before a Grand Jury of the Circuit Court for the Southern District of New York in obedience to a subpœna that directed him to appear and give evidence "in an action therein pending between the United States and The American Tobacco Company and McAndrews & Forbes Company." He was directed also to bring with him a great number of papers, contracts and correspondence—including the contracts and correspondence between McAndrews & Forbes Company and some thirteen tobacco manufacturing concerns, from the incorporation of the McAndrews & Forbes Company to the issuance of the subpœna. Upon his appearance, and before being

sworn, appellant asked that he be informed of the nature of the action with respect to which he had been called to testify—whether it was under any statute of the United States, and if so what, and that he be furnished a copy of the complaint, information or bill of indictment upon which this investigation was based. No response was made to his request and he was required to be sworn. He testified to his name, age, residence and official relation to McAndrews & Forbes Company—he was its Secretary and Treasurer and one of its directors. He was then asked questions leading up to and including the question as to the existence of any arrangement, understanding or agreement between McAndrews & Forbes Company and The American Tobacco Company. He refused to answer these questions because there was no legal warrant for his examination at all, and, moreover, because his answers might tend to criminate him. He was asked if he had produced the papers called for, and said he had not because *first*: it was impossible for him to collect them within the time allowed; *second*: because he was advised by counsel that under the circumstances he was under no obligation to produce them; and *finally*, because they might tend to criminate him. He was told by the Assistant District Attorney that this was a proceeding under the Sherman Act, and that under the Act of 1903 no person could be prosecuted on account of any transaction with respect to which he testified, and the Assistant District Attorney further advised him that it was not the purpose to prosecute him, and that he thereby offered and assured to appellant immunity

and exemption from punishment. Appellant persisted in his refusal. He and his counsel then appeared, with the Grand Jury and the Assistant District Attorney, before Judge Lacombe. It was suggested by the Assistant District Attorney that the proper practice was for His Honor to direct the witness, appellant, to answer the questions and produce the papers. This suggestion was assented to by appellant's counsel and the Circuit Judge gave such direction *pro forma*. Appellant persisted in his refusal and application was made to Judge Lacombe for his punishment for contempt. Acting again *pro forma*, Judge Lacombe adjudged him in contempt and committed him to the custody of the Marshal until he should answer the questions and produce the papers. A writ of *habeas corpus* was sued out returnable before Judge Wallace. After argument Judge Wallace delivered an opinion, which is in the record, and which opinion closes as follows :

"The conclusions thus indicated would ordinarily
 " lead to an order for the petitioner's discharge ; but
 " the order compelling him to produce the papers alluded
 " to in the subpœna was made by one of the judges of
 " this court, and although it was not made under cir-
 " cumstances which afforded an opportunity for delib-
 " erate consideration, the manifest impropriety of re-
 " versing it indirectly in the same court held by a dif-
 " ferent judge is so great that it ought not to be done
 " if the only result will be to shift the burden of prepar-
 " ing a record for a review by a higher tribunal from
 " the one party to the other. Whether the present de-
 " cision is in favor of the petitioner or against him, it is

" understood that it will be taken for review to the
 " Supreme Court and pending that review the petitioner
 " will not be confined. Under these circumstances an
 " order will be entered refusing the discharge of the
 " petitioner."^a

It is from that order that this appeal is taken.

While it is not in the order that the questions are discussed in the brief, we desire here, with your Honors' permission, to present, in the first place, the contention that appellant should not be required to answer the questions because they tended to criminate him, and he has no immunity from prosecution. We are not now dealing with an auditor, as was the case in *Brown v. Walker*,^b and it seems to us there is no question of the good faith of appellant in pleading his constitutional privilege. He was a director as well as Secretary and Treasurer of one of the corporations that were mentioned in the subpœna as defendants. If it were guilty of a crime, then, in all human probability, he was guilty of a crime, and he was acting only the prudent part in insisting upon his constitutional rights and refusing to testify, unless he could have the assurance of indemnity.

It was of course not sufficient that such assurance be given by the Assistant District Attorney—it must appear that the statute referred to by him, or some other valid statute, gives immunity, and to a witness testifying under those circumstances. Now, the words of immunity of the Act of 1903 are sufficiently broad to give full immunity to those to whom they are applicable at

^a *Record*, p. 34.

^b 161 U. S., 591.

all. They are taken from the Act of 1893, passed in aid of the Interstate Commerce Law, and had been held in *Brown v. Walker* sufficiently broad to be taken as a full substitute for the constitutional protection against compulsory self-incrimination. But the appellant contends that the fullness of the pardon granted by the act will not avail him because it has no application to a witness who testifies only before a grand jury. The Act of 1903 makes an appropriation for the enforcement of the Sherman Anti-trust Act, the anti-trust features of the Wilson Tariff Act, and the Interstate Commerce Act—and as a proviso and in order to compel the testimony of witnesses, even when self-incriminating, there is granted an immunity to witnesses from prosecution on account of any transaction about which they may testify "in any proceeding, suit or prosecution under said acts." A grand jury investigation such as this, and indeed any grand jury investigation, is not a proceeding, suit or prosecution under the Sherman Act, we respectfully submit, with those words construed as they should be construed in the connection in which they are used.

It seems to us clear that in determining whether a witness falls within a class to which the pardon of the statute is applicable, this Court will strictly construe that statute. If it ever becomes necessary for appellant to rely on this pardon, extraordinary in its nature as it is, there will certainly be a strict construction against him. Let us imagine his being indicted in the State Courts of New York, for instance, for violating its anti-trust law—as he may at any time be

indicted—and that he seeks to avail himself of this extraordinary pardon and exemption granted him by Congressional enactment, and can there be a doubt that every intendment, as well as every prejudice, will be against him—and that he will be required to bring himself clearly and undoubtedly within the terms of the Act.

It is not intended here to argue the matter, but we do desire to call to the attention of the Court in this connection the far-reaching and almost startling nature of this exemption and immunity in a case such as this, where the danger to the witness from State prosecution is not merely fanciful and therefore negligible, but very real, and where the value and substance of his immunity depends absolutely on the power of Congress to stay the hand of each State in the maintenance of law and order within its own borders. Congress, under *Brown v. Walker*, has perhaps that power, but certainly one who seeks to rely on the Congressional Act to defy the State authorities will be required to bring himself within the Act construed *in strictissimis verbis*. Since the Act will be construed strongly against him when he seeks to rely on it, it ought, in common justice, to be construed strictly in his favor now when it is sought to be made the instrument of compelling him to testify.

So construed, and taking into account the history of the Act, is any investigation before a grand jury a proceeding, suit, or prosecution under the Sherman Law? It seems to be agreed that it is not a "suit"—indeed it is apparent that this Act of 1903, in its use of the word "suit," referred to the "suits" for treble damages authorized by the Sherman Law to be brought

by individuals injured in their business. And, without respect to that, the word "suit" has not technically, nor colloquially, any meaning that includes a grand jury investigation.

Under holdings of this Court a grand jury investigation is just as certainly not a "prosecution," and cases are cited on the brief. Of course it is not a "prosecutions," for the United States Constitution provides for public prosecutions, and grand jury investigations have been always secret. Indeed, it is the province of a grand jury upon a bill of indictment being presented to it to determine whether or not the citizen shall be subjected to the expense and embarrassment of a prosecution, and the prosecution cannot be said to have begun until the indictment has been found—if the indictment is not found the accused can truthfully say he has not been prosecuted.

Circuit Judge Wallace seems to have agreed with us so far, but he expressed—with expressed hesitation and doubt—the feeling that the grand jury's investigation was a "proceeding" under the Sherman law. We respectfully contend that it is not. Proceeding is, as sometimes used, a very broad word, and includes everything included by the words "suit and prosecution"—indeed, it may include any step taken from the time the criminal is first suspected until he is finally hanged. It does not always have such breadth by any means.

In *Post v. United States*^a for instance, an Act of Congress was considered which provided that all criminal proceedings thereafter instituted for the trial of offenses

^a 161 U. S., 583.

against the United States in Minnesota should be instituted in the division where the offense was committed. Theretofore proceedings might be taken in any division to punish an offense committed anywhere in the State. It appeared that the defendant was charged with an offense committed outside of the division where he was tried. The grand jury was in session and considered the charge made against the defendant and examined all the witnesses with respect to it before the statute was passed, but returned a bill of indictment after the law had passed and become effective. This Court held that the law was operative on such a case; that, while it was limited to "criminal proceedings" instituted after its passage, it had effect on that case because the submission of a bill of indictment to a grand jury, and the examination of witnesses by the grand jury, are no part of, but precede, criminal proceedings. So State courts—one or two of the cases are cited in the brief—have given to the word "proceedings" a narrower meaning, dependent upon the circumstances surrounding the use of the word.

Now, in the Act of 1903 the word "proceeding" was not used in its broad, and, we might say, unlimited sense—if it had been so used, neither the word "suit" or "prosecution" would have been used. It was not used as a drag-net sort of word—to sweep up the crumbs of meaning left by other words—if it had it would have followed the other two and we would have instead of the group "proceeding, suit or prosecution," the words "suit, prosecution or other proceeding whatsoever."

Indeed it seems to us evident that in its use of the word "proceeding," Congress hadn't in mind a criminal proceeding at all. Just as the word "suit" was used because the Sherman Law gave a "suit" for treble damages to injured individuals, so the word "proceeding" was used because the Sherman Law called the suit in equity that the Attorney General is authorized to bring to enjoin its violation a "*proceedings* in equity."

In 1893 Congress passed the statute to compel witnesses to testify to violations of the Interstate Commerce Act. They were given immunity from prosecution for any act concerning which they might testify before the Interstate Commerce Commission, or "in any cause or proceeding, original or otherwise," growing out of a violation of the Act. It was that statute which in 1896 was considered by this Court in *Brown v. Walker*. Counsel and the Court assumed that the proceedings contemplated by that statute included a grand jury's investigation. Such presumption was justified, for the word was apparently used there with a drag-net sense. The purpose of Congress to include grand jury investigations was not discussed—but the inconvenience of perpetuating testimony before a grand jury was urged in the dissenting opinions as a reason why the statute should be held invalid. In 1903 Congress passed the statute now in question. That the draftsman of the Act of 1903 was familiar with the case of *Brown v. Walker* is perfectly evident. If he had desired this Act of 1903 to compel the production of testimony before grand juries, is it not singular that he did not adopt the drag-net language that already in

Brown v. Walker had been assumed to include grand jury investigation?

The Act of 1903 was passed mainly in aid of the Sherman Law—there was already the immunity statute of 1893 with respect to the Interstate Commerce Law and the Act of 1903 was not needed for it. Two things that its draftsman certainly had before him was the Sherman Law and *Brown v. Walker*. When he came to determine where and under what circumstances witnesses should be forced to testify even to incriminating things, he deliberately left the adjudicated language of *Brown v. Walker*, and used the words suggested to him by the Sherman Law—its most prominent remedial feature were the proceedings in equity, so it was provided that in these the witness must testify—next were the suits for treble damages by injured persons, and it was provided that in such suits he must testify—and finally, since the Act provided that its violation should be a misdemeanor, there was also provided that he must testify in criminal prosecutions.

Conceding the power of Congress to force self-incriminating evidence in a grand jury investigation, is it at all unlikely that Congress saw fit not to do so, and purposely used language other than that of the statute considered in *Brown v. Walker*. This immunity that is to be the perfect substitute for constitutional protection should be a practical thing. When a man testifies before a commission or a master his testimony is perpetuated; when he is in open court he may have his private stenographer, or friends enough to form a cloud of witnesses. But the grand jury is an ephemeral

thing; it has no records; it has no stenographer; it has no minutes; sometimes no district attorney is before it; it considers many charges—and sometimes, as in this case, matters that are not charges at all; its members disperse to their homes and business and their service in the grand jury room is soon a closed and forgotten incident. These things were considered in *Brown v. Walker*, but they were considered on the question of the power of Congress, and we are asking that they be considered now on the question of the meaning and intent of Congress. It would seem to us that it was concluded by Congress that whatever its power, it was its purpose that only when the Attorney-General began his proceeding for injunction; when the injured party began his suit for damages; or when the grand jury found a bill of indictment and said that a prosecution should begin,—that one of the participants in the violation of the Sherman Act should be required to testify. And it would seem to us wise in Congress to so limit the compulsion, whatever power Congress may have had.

It is argued by the Government that such a construction largely defeats the purpose of the statute and should not be adopted—the argument of expediency is put forward. In the first place, we might reply that this is not a Court of expediency, but a Court of Law. In the second place, and recognizing the principle that laws should be so construed—but not added to—as to give them their intended remedial effect, we would call to the attention of the Court that all of the victories for the Government under the Sherman Act have been with-

out the aid of any construction of the Act of 1903 such as the Government here contends for. The Joint Traffic case; the Trans-Missouri case; and the Addyston Pipe and Foundry case—the case last named being one of an industrial combination—were indeed won without the Act of 1903 at all. With great respect, we say that the Government seeras to us to have inverted the order of proceedings intended by Congress in the Sherman Law and in the Act of 1903. It was the proceeding in equity that was intended to give the remedy. The crime was only a misdemeanor punishable, so far as a corporation is concerned, only by a fine. Knowing as we do that the subpoena in this case was issued in good faith, we know that the Assistant District Attorney was seeking to punish only the corporation. Is it not strange that he goes to the grand jury first, where the witness can have no counsel; where questions of relevancy cannot be adequately considered. If there does not exist a condition that will enable the Assistant District Attorney to draw a bill in equity and so begin his proceeding; or a condition that, with the prospect of recovering three times his actual damages, does not tempt a private individual to bring suit for a redress of his grievances; or a condition that enables the District Attorney to get a true bill from his grand jury and so institute a prosecution; then surely no condition exists that warrants the Government in asking the Court's aid, to even the thickness of a hair, beyond the letter of the law, construed strictly in favor of the Constitutional rights of appellant.

In the next place appellant contends that this whole

investigation—or, used in its unlimited sense, “proceeding” by, or before, the grand jury—was unauthorized, and that he was not bound to attend, much less to testify and produce papers, because the grand jury was not investigating any charge, it was merely making an inquiry—of which likely it never heard until the appellant came before it—to ascertain if a thorough investigation of the affairs of the two suspected companies would not reveal a crime. Its acts were therefore *coram non judice*, and no one could be held in contempt for refusing to obey its directions.

This is not a formal or technical matter. It is by no means such a question as was presented to this Court in *Frisbie's case*,^a where the Court held that the absence of the formal endorsement, “A true bill,” did not invalidate a bill of indictment, because by custom the necessity for such formalities had been dispensed with. This is a very real, and as it seems to us a very vital question, in the administration of the Federal Criminal Law. Has the grand jury inquisitorial power, or is its jurisdiction limited to the investigation of particular charges?

It will hardly be seriously contended that the grand jury was not in this case attempting the exercise of inquisitorial power; the minutes of the grand jury upon which the adjudication of contempt is based shows not only the substance of no charge, but the existence of none—and surely no presumptions will be indulged against the liberty of the citizen. The sweeping nature of the subpoena *duces tecum* indicates that it was not a

^a 157 U. S., 160.

charge that was being investigated but the whole past life of the suspected corporation.

If appellant is right in his view that this attempted exercise of inquisitorial power was beyond the jurisdiction of the grand jury he was justified in declining to answer any question, incriminating or otherwise, although he would not be permitted to inquire into the organization of a *de facto* grand jury, and although, of course, he would not be permitted to refuse to answer because of the insufficiency or informality of a specific charge. Proper jurisdiction is essential before any court, or any arm of the court, such as a grand jury, can require any one to pay the slightest attention to any of its directions or process. This Court said through Mr. Justice Miller in the Fisk case:^a

“ When, however, a court of the United States
 “ undertakes by its process of contempt to punish
 “ a man for refusing to comply with an order
 “ which the Court had no authority to make, the
 “ order itself being without jurisdiction is void,
 “ and the order punishing for contempt is equally
 “ void.”

It doesn't seem to us that the direction of Circuit Judge Lacombe to the witness to answer the questions and produce the papers as directed affects the question at all. In the first place the record fully warrants the statement that such direction was not induced by any such purpose of Judge Lacombe; it was absolutely *pro forma*. In the next place such direction did not embody, nor pretend to embody, any charge—it could not confer

^a 113 U. S., 713.

any jurisdiction. At most, and even leaving out of consideration its *pro forma* nature, it was the expression of the opinion of Judge Lacombe that such jurisdiction did exist, and such circumstances, as legally required appellant to answer the questions and produce the papers. That is only the effect of the judgment remanding appellant to custody, and it is from that action that this appeal is taken.

We are necessarily brought, then, to the serious question: Has a federal grand jury inquisitorial power?

It would not be frank to deny that many grand juries have exercised such power. In the State of Tennessee, the legislature may and frequently does, in the statute which creates a crime, provide that with respect to it grand juries shall have inquisitorial power, and the courts of that State have held that with respect to such crimes grand juries have such power, while with respect to all others their power and jurisdiction is limited to the investigation of particular charges. In some other States the laxity of procedure that has grown up and that now has custom for its authority—such as is referred to in the *Frisbie* case—has induced courts to declare—inadvisedly as it seems to us—that, without statute, a grand jury may conduct roving investigations without the pendency of a charge, formal or otherwise. We believe that a consideration of the Government's and appellant's brief will show that our contention is supported by quite as many and quite as well-considered and persuasive authorities as are on the other side, and we even more

firmly believe that considerations other than a mere balancing of adjudications will induce this Court to decide against the existence of this power of general inquisition.

In the first place the Court should note the contrast between the position of the grand jury according to the conception of the appellant, and its position according to the conception of the Government. We believe that the grand jury is a part of the judiciary; that it was designed for the protection of the citizen. A famous essay was written in the 18th century by the great Lord Chancellor Somers, entitled "The Security of Englishmen's Lives; or the Trust, Power and Duties of Grand Juries in England," and in that essay as everywhere, down to and including the Constitution of the United States, it is assumed or asserted that the institution of the Grand Jury is for the protection of the citizen. No citizen, provides our Constitution, shall be subject to the expense, the inconvenience, the embarrassment and the publicity of a prosecution for an infamous crime except upon the indictment of a grand jury.

The Government on the other hand seems to have the theory that the grand jury is a part of the police department. It is organized into something resembling a detective bureau but with infinitely more and more dangerous power than a detective bureau could ever have.

It is our theory that the detection and prosecution of criminals is essentially a duty of the executive department; that when that department reaches the conclu-

sion that a crime has been committed and that a particular individual is guilty, the law, out of tender consideration of the rights of the citizen, and recognizing too that the ardor of investigation and pursuit has perhaps rendered the police department incapable of weighing judicially the probabilities, requires the action of a grand jury.

We believe our conception is the right one. First, it was unquestionably the old, common-law conception; the common law grand jury was the one referred to by our Constitution and its jurisdiction has never been attempted to be enlarged by Congressional enactment. The authorities cited in the brief, and the *Frisbie* case which is the chief reliance of the Government, show that at common law, and in the olden time grand juries were authorized only to pass upon indictments given them in charge by the King's Solicitor, and make presentments of matters within their knowledge. In the discharge of this last duty they were not permitted to summon or examine witnesses. The formalities have in our more hurried days been dispensed with—the formal bill of indictment is frequently not drawn at all until after the grand jury has acted—just as in some courts oral pleadings are allowed in civil actions—and it is to matters such as these that *Frisbie's* case refers. But the hurried times we have fallen upon, and the power of custom, have not operated to change the very character and jurisdiction of the grand jury. A charge—formal or informal—is the basis of its jurisdiction. It was in this case not investigating a charge at all, but having an inspection of all the papers of a corporation,

and having its Secretary present to explain them—it was seeking information as to whether or not it had committed some offense.

Again, we have said that Congress has not enlarged the power of grand juries so as to make them inquisitors. Is it not evident that Congress cannot constitutionally do so? Grand juries are only a part of the Circuit and District Courts respectively, and the power conferred on the courts of the United States by the Constitution is judicial. Judicial action is judging—and not detective work; the weighing—not procuring—testimony. There must be a plaintiff or complainant—who in any orderly grand jury proceeding is the United States; there must be a defendant—who is the party charged; and there must be a cause of action—the charge, whether formally or informally made. We submit that Congress could not, and has never attempted, to create a body so dangerous in its nature as a grand jury according to the conception of the Government would be—a body having the duty to ferret out crime after the order of a secret service organization, and with the power of a court to compel the attendance of witnesses, and the production of books and papers. Such a body, with such a mixture of the duty of police investigation and the power of judicial force and compulsion over citizens, makes us think of some Continental countries, perhaps, but not of England or America.

Finally, this Court while it has not expressly denied the existence of the inquisitorial power of grand juries has, it seems to us, clearly intimated that they have no

such power. In a very recent case^a the Court speaking through Mr. Justice Brewer said:

" The grand jury is a body known to the
 " common law, to which is committed the
 " duty of inquiring whether there be probable
 " cause to believe the defendant guilty of the
 " offense charged."

In *Counselman's case*^b there is a very strong intimation by this Court against the inquisitorial authority of grand juries. In that case it had been argued by both Mr. Carter and Mr. Jewett, who represented the witness, that the reports of the grand jury in showing that it was investigating and inquiring into certain alleged violations of the Interstate Commerce Act by the officers and agents of three specified roads, did not suffice to show that it had jurisdiction. Of course their main argument was on the question that has made the case a famous one, to wit: the inadequacy of the immunity statute then considered. The Court decided the case in favor of the witness on the inadequacy of the immunity statute, but said:

" But in the view we take of this case, we do
 " not find it necessary to intimate any opinion
 " as to that question in any of its branches, or
 " as to the question whether the reports of the
 " Grand Jury, in stating that they were engaged
 " in investigating and inquiring into certain
 " alleged violations of the Acts of 1887 and 1889
 " by the officers and agents of three specified
 " railway and railroad companies, and the offi-

^a *Beavers v. Henkel*, 194 U. S., 73.

^b 142 U. S., 547.

“ cers and agents of various other railroad com-
 “ panies having lines of road in the district (there
 “ being no other showing in the record as to
 “ what they were investigating and inquiring
 “ into), are or are not consistent with the fact
 “ that they were investigating specific charges
 “ against particular persons ; because we are of
 “ the opinion that upon another ground the
 “ judgment of the Court below must be re-
 “ versed.”

In view of these distinct intimations, we feel justified in the belief that this Court will confine the jurisdiction of a grand jury to its judicial functions—to acting as arbitrator between the accuser—the executive—the police department—and the accused; and not add the grand jury, with its enormous judicial power, to the force of agents and counsel whose duty it is, under the Act of 1903, to ferret out breaches of the Sherman Law, if such exist.

In the last place, we contend confidently that this order for the production by their official custodian of a mass of the books and papers of McAndrews & Forbes Co., was an attempt to make an unreasonable and unwarranted seizure and search and was in violation of the Fourth Amendment. We do not intend, here, to go into any historical review of the Fourth Amendment, although some attempt is made to do so in appellant's main brief. It suffices to say, that we owe it—as most of our other Constitutional provisions for the protection of personal liberty—to England. Its principle became fully engrafted upon the unwritten

Constitution of England in 1765 in *Entick's*^a case—Lord Camden's judgment in that case is termed by Mr. Justice Field of this Court, "one of the landmarks of English liberty." *Entick's* case was for trespass against four King's Messengers for entering his dwelling house and examining his papers. In Lord Camden's judgment the search was denounced as illegal. This case, being connected as it was with the prosecution of Wilkes for libel, was one of the noted cases of its time, and, to again quote Mr. Justice Field, was "welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country." It was certainly known to and in the minds of the framers of the Fourth Amendment to our Constitution, and they reduced the doctrine of that case to definite words: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

It is settled by *Boyd's* case^b that an unreasonable order to produce books and papers is just as certainly, as it is just as effectively, an unreasonable search and seizure as if the officers of the law went into—or even broke into—the house of the party to make the search and seizure. In *Boyd's* case there was considered a provision in the customs law that, in certain proceedings for forfeiture, the Court might, on petition of the District Attorney, require the production of the books and invoices of an importer, and in the absence of such production the statements in the petition of the District Attorney, as to the effect of such books and

^a 19 How. St. Tri., 1029.

^b 116 U. S., 616.

invoices, should be taken as true. So here, at least equally with *Boyd's* case, there is a search and seizure of the books and papers of the corporation, just as effective and just as offensive as though by the breaking of doors. The official custodian is ordered to produce them for inspection, and not doing so is put into custody, there to remain until he does produce them.

It is our understanding that the Fourth Amendment, so far as it has application to papers and books, has two distinct purposes: One is the protection of the right of privacy; and the other is, as pointed out in *Boyd's* case, to co-operate with the Fifth Amendment in preventing the compulsory production of self-incriminating testimony. Every man, and every association of men, it seems to us, has the right to maintain the privacy of his private papers, and, in order to do so, he is not required to plead that they may tend to criminate him; and their production for inspection is not compelled by ever so many statutes providing immunity from criminal prosecution. This right—as most other private rights—must yield to the public necessity; and one paramount public necessity is the due and orderly administration of justice. So if an issue arises in a court of competent jurisdiction to which my papers—however so private in their nature—are relevant, I may be required to produce them. But the one essential thing to any lawful requirement that I produce them is that they be relevant. The adjudications to this effect, and the cases in which this has been assumed, are too numerous to be cited. In the very recent *Baird* case^a,

^a 194 U. S., 25.

where the officials of competing Pennsylvania coal roads were required to produce contracts, the very point principally discussed in this Court, and by this Court, was the relevancy of these contracts to the issue there presented. And the issue presented was by a definite charge by petition filed against definite corporations for a definite combination—a charge made with great particularity as to details and circumstances.

What have we in the present case? The corporation is required to expose its entire business life—indeed, an inspection of the subpœna indicates that it will have few if any books or papers left in its office if it complies with this virtual search warrant; they will all be in the grand jury room; and no charge is pending—no issue is raised—nothing exists upon which the Court can even discuss or think about the question of relevancy, much less decide it.

And this is without reference to the fact that this very corporation is the one who is sought to be charged with a crime—if perchance a microscopic investigation of its life, such as no individual will have to stand until judgment day, reveals a crime.

Relevancy is the only justification for forcing the inspection of private papers in a judicial proceeding—and the quality of relevancy is as inconceivable unless there is a charge or allegation or issue upon which the relevancy can be predicated, as is the quality of similarity or dissimilarity without an object to which the comparison is made. Circuit Judge Wallace used strong language, but certainly not too strong, when he said of this subpœna:

" It falls but little short of being in substance
 " and effect a roving commission devised by the
 " Government to compel a witness to bring be-
 " fore the grand jury a general mass of the
 " private papers of this principal in order that
 " the prosecuting officer might discover whether
 " at any time during the corporate life the prin-
 " cipal had been a party to any act which could
 " afford the basis of a criminal accusation. This
 " was a wanton assault upon the right of
 " privacy, and in my judgment the process in
 " view of the circumstances under which, and
 " the purpose for which, it was issued, author-
 " ized an unreasonable search and seizure of
 " papers within the spirit and meaning of the
 " fourth amendment."

Not only, though, does the Fourth Amendment protect the right of privacy; as thoroughly discussed and demonstrated in *Boyd's* case by Mr. Justice Field, it is also linked with and is in aid of the Fifth Amendment in preventing the compulsory production of self-incriminating evidence. Even if the private papers of this corporation were relevant to a charge or issue, their compulsory production would be in violation of the Fourth Amendment if they tended to criminate the corporation. In *Boyd's* case only one paper was sought, and it was certainly relevant. But its enforced production was unlawful because it was had in order to subject the one producing it to a forfeiture.

Of course there is one adequate answer to this particular contention, as to protection against production of a criminating paper or papers, if the Government makes it and the Court adopts it; that is, that the Act

of 1903 gives immunity to the corporation if under such compulsion as this it produces its papers for inspection—or, what is the same thing, its Secretary is required to tell their contents. This seemed to be Circuit Judge Van Devanter's opinion in the Paper Trust case. Two considerations principally prevent our being satisfied with the view that the corporation obtains immunity: It is evidently not the theory of the Government that the corporation shall obtain immunity; the subpœna shows that appellant's corporation is one of the two parties whom the District Attorney hopes to indict. Then, again, we are afraid that when the corporation claims the immunity because it has through its Secretary produced evidence, courts will—as in all other cases—construe the statute strictly against whomsoever seeks to avail himself of it, and hold against the immunity, not only on the grounds heretofore stated, but also hold that only the person who appeared as a witness and who manually produced the evidence, to wit, the Secretary, has the immunity from punishment. At any rate, and leaving aside the question of an unauthorized encroachment on the corporation's right of privacy, and considering only its right to be protected against the compulsory production of self-incriminating evidence, we earnestly insist that the corporation be not required to make such production, unless and except upon the distinct ground that it has thereby become exempt from punishment—entitled to all the benefits of the Act of 1903.

Now, this is not a case of one party's pleading another's privilege. The corporation can have no pos-

session of papers but by the hands of its officers, and it can claim a privilege only through the mouths of its officers, and the possession by its Secretary of its books and papers in its possession. In his petition for a writ of *habeas corpus*, appellant called attention to the character of his custody of these papers, and pleaded his corporation's rights, as well as his own rights and duties, in the premises. It is his and his corporation's rights that he now insists upon—his corporation speaking through him—the only way it can speak.

There remains the final question—if it is a question—are corporations entitled to the protection of the Fourth Amendment, or is that principle of constitutional law for the benefit only of natural persons? This Court has never had occasion to pass upon the subject. Circuit Judge Van Devanter speaks of it as an undetermined question, but declares his conviction that corporations are under the protection of that amendment as fully as natural persons. In England, where the doctrine was established, corporations are fully entitled to the protection, as shown by cases cited in appellant's brief. In New York and Pennsylvania, the courts have decided that corporations, as well as natural persons, can effectually protest against an unreasonable search of their affairs. Text writers have reached the same conclusions, notably Prof. Wigmore in his recent scholarly work on Evidence.

We have found no authorities against appellant's contention, and on principle it seems to us unquestionably sound. So far as the right to privacy is concerned, we see no reason why the fact that individuals see fit to

carry on certain of their business under legal corporate form should deprive that corporation—and therefore them—of the right of privacy with respect to that business. So far as the right to be protected against the search of papers for the purpose of incrimination is concerned, it seems to us clear that where there exists criminal liability there should exist also the constitutional guarantee against the compulsory production of self-incriminating evidence. And there is a criminal liability against corporations by the very terms of the Sherman Act.

Again, this Court has frequently held that a corporation is a "person" and protected by the Fourteenth Amendment, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It seems to us that the same reasons that induced this Court to hold that corporations are included in the word "person" and are protected against the unlawful acts of States, will induce the holding that they are included in the word "people" and are protected against the unlawful acts or attempts of the Federal Government. The Fourth and Fourteenth Amendments protect rights of the same sort—rights that are the most prized possession of Anglo-Saxons. They are of the kind referred to by Mr. Justice Harlan in the *Hawaiian* case.^a

" In my judgment neither the life, nor the liberty
 " nor the property of *any* person within any territory
 " or country over which the United States is sovereign,
 " can be taken under the sanction of any civil tribunal

^a 190 U. S., 197.

“ acting under its authority by any form of procedure
“ inconsistent with the Constitution of the United
“ States.”

On account of all these things, as well as others presented in our main brief, we ask that appellant be discharged.

WILLIAM M. HENKEL

WILLIAM HENKEL, UNITED STATES MARSHAL, ET AL, FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

DE LAURENCE WOOD,
JAMES PARKER,
EDWARD LINDSAY,

Of Counsel for Appellants

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 341.

WILLIAM H. McALISTER, Appellant,	}	BRIEF FOR APPELLANT.
AGAINST		
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York,		
Respondent.		

Statement of the Case.

This is an appeal from a final order of the United States Circuit Court for the Southern District of New York, entered June 14, 1905, denying the appellant's application for a writ of *habeas corpus* (Rec. pp. 29-30), whereby he sought to secure his release from custody under a warrant of commitment issued by the same Court on that day pursuant to an order adjudging him guilty of contempt.

It appears by the petition (Record, pp. 1-4) and the accompanying exhibits that on June 14, 1905, the petitioner, who is a director and the secretary of the American Tobacco Company, a New Jersey

corporation (p. 1), presented himself before the Grand Jury for the Southern District of New York in obedience to what purported to be a writ of *subpœna duces tecum* issued out of the Circuit Court for the same District on the previous day, under the seal of the Court, signed by the Clerk, and bearing *teste* of the Chief Justice of the United States (pp. 10-11), commanding him to lay aside all business and excuses and appear and attend before that body.

“to testify and give evidence in a certain suit or proceeding now pending undetermined in the Circuit Court of the United States for the Southern District of New York, before the Grand Jury thereof, between the United States of America, as complainant, and the American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States”;

and further commanding him to bring with him and produce at the time and place aforesaid

“(1.) An agreement, bearing date September 27th, 1902, between Ogden's, Limited, of the first part; the American Tobacco Company, of the second part; the Continental Tobacco Company, of the third part; American Cigar Company, of the fourth part; Consolidated Tobacco Company, of the fifth part; British Tobacco Company, Limited, of the sixth part; and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the seventh part; a copy, or a duplicate original, of the said agreement being on file or recorded in the companies' registration office, in London, England.

(2.) An agreement providing for the transfer, to a separate company, of the export business from the United Kingdom (except to the United States) not only of Ogden's, Limited, but also of the Imperial Tobacco Company (of Great Britain and Ireland), Limited, and of Salmon & Gluckstein, Limited, and the export business, from the United States, of the American Tobacco Company,

the Continental Tobacco Company and the American Cigar Company (except to the United Kingdom), which agreement is referred to in the said last-mentioned agreement of September 27, 1902, as having been then already prepared and executed contemporaneously therewith.

(3.) An agreement, dated September 27, 1902, between the Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the first part; Ogden's, Limited, of the second part; the American Tobacco Company, of the third part; the Continental Tobacco Company, of the fourth part; American Cigar Company, of the fifth part; Consolidated Tobacco Company, of the sixth part, and Williamson Whitehead Fuller and James Inskip, of the seventh part."

The subpoena gave the petitioner notice that for a failure to attend, he would be "deemed guilty of a contempt of Court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit TWO HUNDRED AND FIFTY DOLLARS in addition thereto" (p. 11).

Before being sworn the petitioner asked to be advised what the "suit or proceeding" was, which was thus described in the subpoena, its nature and purpose, and the specific charge against the defendants, if any had been made, in order that he might learn whether or not the Grand Jury had any lawful right or authority to examine him as a witness; and he also asked that he be furnished with a copy of the complaint, information, or proposed bill of indictment, if any, upon which the Grand Jury was acting, so that he might know concerning what transactions, matters or things he was called upon to testify or produce evidence (pp. 11-12).

In reply one of the assistant United States attorneys, in attendance before the Grand Jury, addressed him as follows (p. 12):

"Mr. McAlister, this is a suit or proceeding now pending before the Grand Jury, upon a

complaint and charge made, in behalf of the United States of America, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, under the so-called 'Sherman Act,' being 'An act to protect trade and commerce against unlawful restraints and monopolies.' Under Chapter 755 of the Laws of the United States of 1903, approved February 25th, 1903, no person may be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, in any proceeding, suit or prosecution under the said 'Sherman Act,' under which this suit or proceedings is brought; provided, however, that no person so testifying shall be exempted from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose of the United States Government not to prosecute you, or subject you to any penalty or forfeiture, on account of anything that you may testify to, or on account of any evidence, documentary or otherwise, which you may produce in this proceeding; and that I offer you, and assure you, immunity and exemption from any such evidence, either documentary or otherwise, that you may give."

The witness thereupon asked for an opportunity to consult counsel before being sworn or subjected to examination; and protested against being sworn on the ground that there was no legal warrant or authority for his examination (p. 12).

He was nevertheless sworn and the Assistant United States Attorney proceeded to interrogate him. Having given his residence and stated that he was the secretary and a director of the American Tobacco Company, he was asked (*Id.*):

(1.) What business is the American Tobacco Company engaged in?

To which he replied:

"I respectfully decline to answer any further questions, on the ground, first; that

there is no legal warrant or authority for my examination; second, that my answers may tend to criminate me; and, third, that my answers may tend to furnish evidence against the American Tobacco Company, of which I am secretary, and which is one of the defendants against which this investigation is directed, and that the Government, in this manner, is attempting to compel the American Tobacco Company to be a witness against itself in a criminal case."

He was then asked the following questions, each of which he declined to answer for the same reasons (pp. 12-13):

(2.) Where is the main office of the American Tobacco Company?

(3.) Where is its office in the City of New York?

(4.) Who are the officers of the American Tobacco Company?

Being asked whether he had produced the papers called for by the subpoena, he answered (p. 13):

"I have not, because, as I am advised by counsel, I am under no legal obligation to do so; second, because they may tend to criminate me; and, third, because they are not my property, but that of the American Tobacco Company, and are in my custody solely by reason of my official relations toward that company. Under these circumstances, my counsel advise me that the compulsion of the subpoena would, if effective, amount to an unreasonable search for and seizure of the company's papers and effects, in violation of its rights under the Constitution, which it is my duty to protect by all lawful means, as I am now doing. I am further advised by my counsel that the subpoena, which is, in effect, a warrant to search for and seize the papers in question, was not issued upon probable cause, or supported by oath or affirmation, and is, for that reason, utterly null and void."

He further stated that he had not produced any of the papers or documents, and that he declined to produce them for the reasons already given (*Id.*).

After this he was further questioned as follows:

(5.) Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco products, cigars and cigarettes, between this country and Great Britain, and any of its colonies (*Id.*, 13)?

(6.) Please describe what the relations are between the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, in connection with the trade in tobacco, tobacco products, cigars and cigarettes between the several States of the United States (*Id.* 13-14)?

(7.) Were you present, in England, when an agreement in writing, dated September 27, 1902, was executed between Ogden's, Limited, the American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, British Tobacco Company, Limited, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, on or about the day of its date?

(8.) Is the paper which I now show you (see Exhibit C, pp. 14-24) a copy of the agreement which was then executed?

(9.) Is Exhibit C, now shown you a copy of one of the papers or documents which you are required by the *subpoena duces tecum*, above referred to, to produce before this Grand Jury?

(10.) Is there an agreement, of which Exhibit C is a copy, now in force (*Id.*, 14)?

The witness declined to answer any of these questions assigning the same reasons given for his previous refusal to testify (*Id.*).

At this point the inquiry was suspended, and the Grand Jury filed in open court a presentment or report charging the witness with contempt in refusing to produce the papers and documents called for by the subpoena, and also in refusing to answer the questions above set forth (pp. 7-10).

The presentment or report informed the Court that on June 13, 1905, and prior to the service of the subpoena on the witness, the Assistant United States Attorney, being in attendance before the said Grand Jury (pp. 7-8):

"duly made and presented to it a complaint and charge, in behalf of the United States of America, against the America Tobacco Company, a corporation organized under the laws of New Jersey, and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, a corporation organized under the laws of the Kingdom of Great Britain and Ireland, that the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been guilty of a violation of the so-called 'Sherman' or 'Anti-Trust' Act, being 'An act to protect trade and commerce against unlawful restraints and monopolies,' 26 Statutes, 209, 1 Supp.; Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and chapter 735 of the Laws of 1903, approved February 25, 1903, in the following particulars, to wit:

(1.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, entered into, and have ever since been engaged, within the Southern District of New York and throughout the United States, in carrying out the terms of a contract in restraint of trade and commerce among the several States of the United States in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(2.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, entered into, and have ever since been engaged, within the Southern District of New York and throughout the United States, in carrying out the terms of a contract in restraint of trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(3.) In that on or about the 27th day of September, 1902, and continuously since that day, the said The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged, within the southern district of New York and throughout the United States, in an attempt to monopolize the trade and commerce, among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(4.) In that on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, did combine and conspire, and ever since that day, within the southern district of New York, and throughout the United States, they have combined and conspired, and have been engaged in carrying out a combination and conspiracy, with each other, and with other persons and corporations, to monopolize the trade and commerce among the several States, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes.

(5.) In that ever since on or about the 27th day of September, 1902, the said The American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited, have been engaged within the southern district of New York, and throughout the United States, in an attempt to monopolize, and have also during said time and

in said places combined and conspired, and have been engaged in carrying out, a combination and conspiracy with each other, and with other persons and corporations, to monopolize the trade and commerce between this country and foreign nations, particularly the Kingdom of Great Britain and its colonies and dependencies, in tobacco and its products, including tobacco leaf, chewing and smoking tobacco, cigars and cigarettes."

It further set forth that the assistant district attorney "acted for the said grand jury and at its request in the investigation of said charges;" that "the said documents and each of them are material to the investigation being conducted by the said grand jury of the charge and complaint submitted to it as aforesaid" (p. 9); that "each of the questions propounded to said witness as aforesaid * * * was pertinent to the said complaint and charge then pending before the said grand jury, and was material thereto (p. 10).

It further informed the Court how the Assistant United States Attorney had, in the Grand Jury room, characterized the so-called "suit or proceeding," and how he had offered and assured the petitioner immunity and exemption for any testimony he might give (p. 9).

On the facts thus set forth the Grand Jury asked that such proceedings be had as were, "in the premises, in accordance with law" (p. 10).

The Grand Jury, the counsel for the government and the witness having repaired to the court room and appeared before the Circuit Judge, and the presentment or report of the Grand Jury having been filed (*Id.*, p. 27), the Court thereupon made the following order (*Id.*, p. 28):

"The witness is hereby directed to answer the questions as propounded by the Grand Jury, and forthwith to produce the papers and documents called for in the subpoena."

The Grand Jury, the counsel for the government and the witness then returned to the Grand Jury room, and the latter's examination was resumed.

The questions were again put to him and he repeated his refusal to answer them, giving his reasons as before. In like manner, and upon the grounds previously stated by him, he refused to produce the books and papers called for by the subpoena *duces tecum* (pp. 28-29).

A second report or presentment setting forth what occurred at this time was thereupon submitted to the Court by the Grand Jury (pp. 25-27). The petitioner being again present, an order was made adjudging him guilty of contempt, fining him five dollars and directing his commitment to the custody of the marshal until he complied with the order of the Court "by answering the said questions and producing the said papers and documents, or is discharged by due process of law" (pp. 6-7).

The writ was applied for in order to secure a determination as to the legality of the witness' restraint under the commitment issued pursuant to this order, by virtue of which the petitioner was taken into custody by the marshal (pp. 5-6). The application was denied upon the ground that it appeared from the petition itself that the witness was not entitled to the writ (pp. 29-30); and this appeal is from the final order entered upon this decision (pp. 32-34).

Specification of Errors.

The appellant contends that the Circuit Court erred in denying his application (1st Assignment, p. 35), in holding that it appeared from the petition itself that he was not entitled to the writ (2d Assignment, *Id.*), and in holding that he was lawfully held in custody under the commitment (3d Assignment, *Id.*). Of the other errors specifically assigned

(pp. 35-38) the appellant particularly relies upon the following:

(a.) Section 1 of the Act of February 25, 1903, does not give the appellant immunity from prosecution, for or on account of the transactions, matters or things concerning which he was directed to testify and produce evidence before the Grand Jury, the so-called investigation herein not being a "proceeding, suit or prosecution" under either of the acts referred to in the Act of February 25, 1903; consequently the appellant was within the legitimate exercise of his right under the Fifth Amendment when he refused to testify or produce evidence before the Grand Jury on the ground that by so doing he might have criminated himself (7th and 9th Assignments, pp. 35-36).

(b.) The order directing the appellant to testify and produce documentary evidence before the Grand Jury was, in effect, an attempt to compel the American Tobacco Company, to give evidence against itself in a criminal case in violation of its rights and privileges under the Fifth Amendment which would have been violated by the appellant's compulsory examination before the Grand Jury (10th and 11th Assignments, p. 36).

(c.) The Act of February 25, 1903, is unconstitutional and void in that it infringes the reserved power of the States to prosecute or pardon offenders against their own laws (13th, 14th, 15th and 16th Assignments, *Id.*).

(d.) The order of May 5th, directing the appellant to forthwith produce the papers called for by the subpoena *duces tecum* was made in violation of the Fourth Amendment, being in effect, a warrant to search for and seize the papers mentioned in the subpoena *duces tecum*, and not being issued upon probable cause, or supported by oath or affirmation, or particularly describing the place to be searched or

the things to be seized (18th and 19th Assignments, *Id.*, p. 37).

(e.) The papers mentioned in the subpoena *duces tecum* being the property of the MacAndrews & Forbes Company and in the appellant's custody solely by reason of his official relations toward that company, the compulsion of said subpoena, and of the order that he produced such papers would, if effective, have amounted to an unreasonable search for and seizure of the papers and effects of the corporation, which it was the appellant's duty as such officer and custodian to protect by all lawful means (20th to 23d assignments, *Id.*).

Brief of the Argument.

The facts do not differ in any material way from those involved in *Hale v. Henkel* (No. 340), except

(1.) That where in the *Hale* case there was no pretense of any pending charge before the grand jury, here the reports of the grand jury set forth that one of the Assistant United States Attorneys "duly made and presented" to that body what is described as a "complaint and charge" against the American Tobacco Company and the Imperial Tobacco Company (of Great Britain and Ireland), Limited; and

(2.) That the subpoena *duces tecum* here is not of the drag net character issued in the *Hale* case, but calls for certain definitely described documents.

Regardless of these differences, our argument in the *Hale* case applies with full force to the facts in this case, so far as it is addressed to the following propositions, which are also presented by this appeal, viz.:

(a.) That a grand jury inquiry is not a "proceeding, suit or prosecution" within the meaning of the act of February 25th, 1903 (*Hale* brief; Fourth Point).

(b.) That that act is unconstitutional and void in that it impairs the reserved right of the States in respect to the administration of public justice (*Hale* brief; Fifth Point); and

(c.) That the subpoena and the order of the Circuit Court directing compliance therewith were issued and made in violation of the rights of the American Tobacco Company under the Fourth Amendment (*Hale* brief; Sixth Point, except so far as the argument there is addressed to the drag-net character of the subpoena and the absence of a specific charge pending against a specified person).

We refrain from repeating in this brief the arguments so advanced in the *Hale* case upon the three propositions above enumerated.

In the Sixth Point of the *Hale* brief the proposition was fully argued that a subpoena *duces tecum*, under which it is attempted to compel an officer of a corporation to produce from the possession of the corporation a private paper of a corporation for the avowed purpose of criminating the corporation, is a violation of the constitutional rights of the corporation under the Fourth Amendment, however definite may be the description of the paper.

Respectfully submitted,

DE LANCEY NICOLL,
JUNIOR PARKER,
JOHN D. LINDSAY,
Of Counsel for the appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWIN F. HALE, APPELLANT, <i>v.</i> WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York.	}	No. 340.
---	---	----------

WILLIAM H. McALISTER, APPELLANT, <i>v.</i> WILLIAM HENKEL, UNITED STATES MARSHAL for the Southern District of New York.	}	No. 341.
--	---	----------

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the appellee in the above-entitled causes, respectfully moves the court to advance the same on the docket on the following grounds:

The cases are in this court upon appeal from orders of the Circuit Court of the United States for the Southern District of New York, in the case of Hale discharging a writ of habeas corpus which had been allowed upon his petition, and in the case of McAlister denying the application for the writ.

The appellants, who are directors and officers of certain corporations engaged in the tobacco industry, were committed for contempt by the said court for failure to

answer certain questions propounded to them by the grand jury, and to produce certain papers before the grand jury which they were directed to produce by subpœnas *duces tecum* duly served upon them. The contempt was committed in the course of a proceeding then pending before the grand jury, under the so-called Sherman or anti-trust law (26 Stat., 209) and the acts amendatory thereof and supplementary thereto. Appellants appeared before the said grand jury, but refused to answer questions and produce papers upon the grounds, among others, that there was no legal warrant or authority for their examination, and that their answers might tend to criminate them. In their petitions for habeas corpus, appellants set forth the following grounds upon which they claimed that their detention was unlawful:

That the Circuit Court was without jurisdiction; that when the examination took place before the grand jury there was no cause or action pending in the said Circuit Court or before the grand jury between the United States and the American Tobacco Company, MacAndrews and Forbes Company, and the Imperial Tobacco Company as recited in the subpœnas *duces tecum*, in which appellants could be required to give evidence; that the grand jury was without jurisdiction, because no specific charge against any particular person was before them; that the act of February 25, 1903, granting immunity to witnesses testifying in a proceeding, suit, or prosecution under the anti-trust law, did not apply to appellants, because a hearing before a grand

jury was not, within the meaning of the anti-trust law, "such proceeding, suit, or prosecution;" that said act of February 25, 1903, is unconstitutional in that it undertakes to grant pardons to persons concerned in matters constituting violations of the laws of the United States, and in that it seeks to set aside the power of the States to punish offenses against their laws, thus being in violation of section 2, Article II of the Constitution, and the tenth amendment to the Constitution, and that the compulsory examination of appellants and the production of the papers called for by the subpoenas *duces tecum* would be in violation of the fourth and fifth amendments to the Constitution.

The determination of these objections is a matter of general public interest. The objections are novel, but may frequently be raised before Federal grand juries hereafter. The determination of the extent of the powers and the nature of the practice of Federal grand juries in all criminal cases, and the meaning and effect of the immunity law of February 25, 1903 (32 Stat., 854, 904), are to be settled by the decision of the court, and upon this decision will depend the question how effectively, under existing law, the provisions of the anti-trust law may be enforced. The proceeding out of which these appeals arose is of wide public interest and importance. It is based upon the violation of the anti-trust law by corporations having capital stock of many millions of dollars and controlling a great part of the tobacco industry. The officers of two of these corporations have, in this proceeding, refused, unless

compelled, to disclose material facts, and it is necessary, as soon as possible, to determine the rules of evidence upon which this and other proceedings of the kind must be conducted hereafter.

This is only one of a number of proceedings pending, at the instance of the United States Government, to punish or restrain violations of the anti-trust law, and it is a matter of common knowledge that similar questions have been raised in some of these proceedings.

An early determination of these matters by this court is important, for the reason that the proceeding out of which these cases arose, and other similar proceedings, in all of which the United States are concerned, can not be properly prosecuted until this court shall have decided the questions involved in the present cases.

Notice of this motion has been served upon opposing counsel, and proof of service thereof filed with the clerk.

HENRY M. HOYT,
Solicitor-General.

FILE COPY.

FILED

DEC 30 1906

AMER. L. SYSTEM

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 840.

EDWIN F. HALL,

Appellant,

vs.

WILLIAM HENKILL, United States Marshal in and for the
Southern District of New York.

BRIEF FOR THE UNITED STATES.

WILLIAM H. MOODY,
Attorney General.

HENRY W. TAFT,
FRANK H. LEVY,

Special Assistants to the Attorney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

EDWIN F. HALE,
Appellant,

vs.

WILLIAM HENKEL, United States
Marshal in and for the Southern
District of New York.

No. 340.

BRIEF FOR THE UNITED STATES.

This is an appeal from a final order of the Circuit Court of the United States for the Southern District of New York made herein on the 10th day of June, 1905, discharging a writ of *habeas corpus* obtained by the appellant (fols. 60, 61).

On the 5th day of May, 1905, the Grand Jury of the Circuit Court for the Southern District of New York presented to the HON. E. HENRY LACOMBE, Circuit Judge, charges of contempt against the appellant herein for his refusal on May 2, 1905, to answer certain questions and produce certain documentary evidence material to an investigation then being conducted by the said Grand Jury. These charges set out the service of a subpoena *duces tecum* upon the appellant requiring him to attend and to produce certain books and papers mentioned therein, his appearance before the Grand Jury and his refusal

either to testify or to produce the documentary evidence called for (fols. 14-18). A copy of the minutes of the proceedings of the Grand Jury at the session at which the appellant attended was attached to the charges (fols. 18, 23).

The charges of May 5 were presented by the Grand Jury in open court in the presence of the witness, who was attended by counsel. The Court forthwith made an order directing the witness to answer the questions propounded to him and produce the papers called for by the subpoena (fols. 30-33). The Grand Jury, through the Assistant District Attorney, then resumed the examination of the appellant, who again refused to answer the questions or produce the documents (fols. 33-39). Thereupon he was adjudged by the Court to be in contempt and was committed to the custody of the Marshal until he should comply with the order of the Court (fols. 10-13).

Upon a petition setting forth the above facts and the grounds more particularly set forth below the appellant obtained a writ of *habeas corpus* (fols. 1-9, 39-40). Upon the return of the writ a hearing was had before Hon. WILLIAM J. WALLACE, and after the matter had been fully argued by counsel and considered by the Court the writ was discharged (fol. 61). Judge WALLACE wrote an opinion, which appears at page 16 of the record.

Most of the questions asked of the appellant were preliminary. Some related to the business of the MacAndrews & Forbes Company, its officers, its place of business, its relation to The American Tobacco Company and other companies (fol. 33 *et seq.*). One question indicating the general line of inquiry was the following:

"Is there any agreement, or understanding, or arrangement, between The American Tobacco Company and MacAndrews & Forbes Company in relation to the trade or business in licorice, licorice paste or licorice mass, affecting that business between several States of the United States?" (fol. 35).

The subpoena *duces tecum* called for the production of a number of contracts, agreements, letters, reports and accounts which were specified in a general way, without specific reference to dates, but indicating certain corporations and firms

with which the papers called for were in some way connected (fols. 24-27).

At the outset the witness presented a paper from which he read as follows :

" Before being sworn, I respectfully ask to be advised
 " of the nature and purpose of the investigation in
 " which I have been summoned here, whether it is
 " under any statute of the United States, and the spe-
 " cific charge, if any has been made, in order that I may
 " learn whether or not the Grand Jury has any lawful
 " right or authority to make the inquiry, and whether
 " there is anything lawfully pending here upon which
 " witnesses may be summoned, sworn and examined ;
 " and I also ask that I be furnished with a copy of the
 " complaint, information or proposed bill of indictment,
 " if any, upon which you are acting, in order that I may
 " know concerning what transactions, matters or things
 " I am called upon to testify or produce evidence. My
 " subpoena requires me to attend and testify and give
 " evidence in a certain action now pending and unde-
 " termined in the Circuit Court of the United States
 " for the Southern District of New York between the
 " United States of America and The American Tobacco
 " Company and MacAndrews & Forbes Com-
 " pany, on the part of the United States,
 " and to produce various papers and doc-
 " uments. I am informed that there is no action
 " now pending in the Circuit Court between the Gov-
 " ernment and the corporations named, and the vague
 " and general description of the papers and documents
 " leads me to suppose that the Grand Jury is investi-
 " gating no specific charge against any one. If that is
 " the fact, my counsel advise me that I ought not to
 " obey the summons or submit to examination " (fols.
 35, 36).

He also declined to answer the questions on these further grounds :

" First, that there is no legal warrant or authority for my
 " examination as a witness, and, second, that my answers may
 " tend to criminate me " (fol. 19).

His refusal to produce the papers asked for in the subpoena *duces tecum* he stated to be on the following grounds :

" First, because it would have been a physical impossibility for me to have gotten them together within the time allowed, and second, because I am advised by counsel that upon the facts as they now appear, I am under no legal obligation to produce anything called for by the subpoena, and, " third, because they may tend to criminate me " (fol. 20).

These grounds were repeated several times at the first hearing before the Grand Jury on May 2d and were referred to at the last hearing on May 5th, as the grounds for the refusal of the witness to obey the order of Judge LACOMBE (fols. 19-22).

The Assistant District Attorney at the first hearing, and in substantially the same words at the next hearing, in the presence of the Grand Jury, addressed the petitioner as follows :

" Mr. Hale, I desire to advise you that this is a proceeding under the so-called Sherman Act, being an act to protect trade and commerce against unlawful restraints and monopolies, 26 Statutes, 209, 1 Supplement Revised Statutes, 762 and following, and the acts amendatory thereof and supplementary thereto, and particularly Chapter 755 of the laws of 1903, approved February 25, 1903, and I also advise you that under the last-named Act, no person shall be prosecuted or be subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence documentary or otherwise, in any proceeding, suit or prosecution under the said Act. That is, referring to the Sherman Act, under which this prosecution is brought: provided, however, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose not to proceed to prosecute you, or subject you to any penalty or forfeiture on account of anything that you are now asked to testify to or produce evidence documentary or otherwise regarding it, in this proceeding, and I offer you and

“ assure to you immunity and exemption for any such
 “ testimony that you may give. Do you still decline to
 “ answer the questions which have been put to you?
 “ A. I must respectfully decline to answer.”

The petition for the writ of *habeas corpus* set out the grounds on which it was claimed that the detention of the petitioner was unlawful (fol. 2-9). These grounds are also set out with somewhat more elaboration in the assignment of errors (fol. 71-77). Without attempting to repeat them in detail and only for the general information of the Court at this time we summarize them as follows :

1. That the Court is without jurisdiction to entertain a charge of contempt against the petitioner or to act or proceed in any manner in the premises.

2. That when the petitioner was examined, there was no cause or action pending in the Circuit Court between the United States and the corporations named in the subpoena *duces tecum* or between any other parties, in which the petitioner could be required to give evidence.

3. That the Grand Jury was without jurisdiction because under the Constitution of the United States it could only investigate “ specific charges against particular persons.”

4. That the legislative, executive and judicial appropriation act, approved February 25th, 1903, granting immunity to witnesses testifying in a proceeding, suit or prosecution under the Anti-Trust Law did not apply to the appellant, particularly because the hearing before the Grand Jury was not, within the meaning of the Anti-Trust Law “ such proceeding, suit or prosecution,” and that, therefore, the appellant was privileged under the Fifth Amendment to the Constitution from giving oral testimony or producing documentary evidence which might tend to incriminate him.

5. That the said Act of February 25th, 1903, is unconstitutional and void in that it undertakes in effect to grant pardons to persons who have been concerned in matters constituting

violations of the laws of the United States and is, therefore, in violation of Section 2 of Article 2 of the Constitution.

6. That the Act of February 25th, 1903, is unconstitutional and void because it seeks to set aside the power of the several States to prosecute and punish and grant or withhold pardons on account of offenses against their laws, thus usurping the power expressly reserved to the several States by the Tenth Amendment to the Constitution.

7. That the above statute of February 25th, 1903, contained no requirement that a person should testify, but only granted to him indemnity in case he elected to testify.

8. That the result of the compulsory production of the papers and documents mentioned in the subpoena *duces tecum* would be in effect an unreasonable search therefor and seizure thereof in violation of the appellant's rights and also of the rights of the MacAndrews and Forbes Company, the owner of such papers and documents which were in the appellant's custody solely as an officer of that Company, under the provisions of the Fourth Amendment to the Constitution.

All of the objections to the detention of the appellant will be fully considered in the following points.

FIRST. As to the procedure before the Grand Jury.

It is broadly contended by counsel for the appellant that a Grand Jury in this country has no power except (1) to consider and act upon indictments previously framed and laid before them by a known prosecutor, and (2) to present facts within the personal knowledge of the members of the Grand Jury or some of them. It is argued that the Grand Jury was continued as one of the institutions of the Federal Government by the Fifth Amendment of the Constitution which went into force December 15th, 1791, providing that "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury * * *"; that the common law of England in

relation to grand juries was then in force; that the Grand Jury referred to in the Amendment was intended to be a body vested with only such powers as the same body possessed under the common law of England which are those just mentioned; and that if Federal grand juries in this country have exercised more extensive powers they have acted contrary to the common law and without regard to the limitations placed upon them by the Constitution.

Upon these broad propositions we take issue, and shall endeavor to show that the procedure of a Grand Jury in this country at the time of the enactment of the Fifth Amendment was and, with unimportant exceptions, has remained quite different from that of the similar body in England; that under this procedure the Grand Jury proceeds, before a bill of indictment is framed, to investigate, at the instance of the Court or of their own body or of the District Attorney, a suspected or alleged crime and to determine *whether* it has been committed, and, if so, *who* committed it; that in so doing they exercise broad inquisitorial powers; that the administration of the criminal law in this country necessitates this procedure; and finally, that this was clearly within the common law *powers* of a Grand Jury in 1791, however different the usual *practice* in England may have been at that time.

The abandonment of the English practice by which a private prosecutor took the initiative in criminal prosecutions necessitated radical changes of Grand Jury procedure in this country, such, for instance, as the investigation of an alleged crime before the preparation of the indictment, and the participation of the public prosecutor as a constant appendage of the Grand Jury, practically directing its proceedings. From the fact that the practice of proceeding at the instance of a private prosecutor was practically universal in England when our Constitution was adopted, it results that few, if any, reported English cases are found either justifying or criticising the American procedure. But, if it be necessary to show that the American practice was, under the common law, within the powers exercised by Grand Juries in England, we think that this will appear from the origin and early growth of the Grand Jury system, and particularly from the custom always recognized, but infrequently followed, of making pre-

sentments upon which indictments were subsequently prepared. When referred to these sources, the power of a Grand Jury clearly extends to the broadest kind of an inquisitorial proceeding. We think that counsel have mistaken a radical change of mere *procedure* for an attempted enlargement of *power*. Or if we are wrong in this, and it is a question of power, it will be clear that long before 1791 the American idea prevailed that the State and not the individual is the agency which should start a criminal prosecution; that this was vitally different from the English idea and necessarily involved radical changes in the grand jury system and the extension of its powers; and that it was with reference to such a system and such powers that the Fifth Amendment was adopted.

We shall first examine the reported precedents at the time of the adoption of the Fifth Amendment and for the first fifty years of our government, to show historically what has been the contemporaneous and practical view of the functions and powers of a grand jury. We shall then take up the later decisions to show by weight of authority that there need not be, before a grand jury may proceed, specific charges against a particular person, but that upon suggestion from the court, or the district attorney, or the grand jury itself, an investigation may be had to determine whether there has been a violation of a particular law, and, if so, who was guilty of it.

I.

POWERS AND PRACTICE GENERALLY CONSIDERED.

(a) For the First Fifty Years of Our Government.

Previous to the enactment of the Fifth Amendment careful research does not disclose any precedent for or historical explanation of the changes from the grand jury procedure of England which undoubtedly took place at an early day in this country. This is no doubt due to the incompleteness of the records of legal proceedings and adjudicated cases. Even during the first hundred years of our independence precedents are not numerous and authority for grand jury procedure rests not so much upon adjudications of the Courts, as upon practice sanctioned by long usage and general recognition.

For more than fifty years after the enactment of the Fifth Amendment, an examination of reported decisions does not disclose a single authority (except a decision in Tennessee influenced by an early Statute of that State) to support the contention of the appellant in this case. On the contrary, there are numerous expressions both of courts and text writers indicating that the procedure of grand juries in this country was in important particulars different from that prevailing in England.

As we have already said, the practice prevailing almost universally in England whereby the private prosecutor caused a bill of indictment to be engrossed and submitted for the action of the Grand Jury with but slight supervision on the part of the State's attorney, seems from an early day to have fallen into almost complete disuse here; while the practice, unknown in England, of having the prosecuting attorney attend as the official representative of the State before the Grand Jury, appears to have become almost universal.

The reason for these changes we shall deal with in another part of this brief and now examine the early precedents.

The first recorded expression upon the subject was contained in a series of lectures delivered in 1791 and 1792 by James Wilson, then a Justice of this Court, who had been a member of the Convention which framed the Federal Constitution and chairman of the committee of that body which reported that document. These were the first law lectures delivered in this country. They were delivered before the University of Pennsylvania, at Philadelphia, and are marked by great research and learning. No higher contemporaneous authority could be found.

In speaking of the powers of grand juries Judge Wilson said (Vol. 2, Wilson's Works, Edition of 1896, page 213):

"It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prose-

"cutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and by accusers, marshalled in legal array, should, on full investigation be secure in that protection, which the law engages that she shall enjoy inviolate.

"The oath of a grand jury man—and his oath is the commission, under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?"

Another contemporaneous expression is contained in the charges to grand juries by Judge ADDISON, who was the President of the Courts of Common Pleas of the Fifth Circuit in the State of Pennsylvania. These charges show a wide experience in grand jury practice. At the September Sessions of the Common Pleas Court, in 1791, in charging the Grand Jury, he called their attention to the form of oath then administered, which was not different in form from that now in use, and particularly to that portion of it charging them to investigate "those things which they may know." He said:—

"If the Grand Jury, of their own knowledge, or the knowledge of any of them, or *from the examination of witnesses*, know of any offence committed in the county, for which no indictment is preferred to them, it is their duty, either to inform the officer, who prosecutes for the state, of the nature of the offence, and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given

" them, it is their duty to give such information of it to
 " the court ; stating, without any particular form, the
 " facts and circumstances, which constitute the offence.
 " This is called a presentment. But the person so ac-
 " cused cannot be called to answer to this, till it is
 " drawn up in form ; which it is the duty of the officer
 " for the prosecution to do. The best way to do this,
 " is to draw up a formal indictment, and present it to
 " the same jury, for their sanction. But if the present-
 " ment state all the material facts and circumstances,
 " I see no reason why such indictment, coupled with
 " this presentment of the jury to the same effect, should
 " not, without any subsequent examination and appro-
 " bation by a Grand Jury, be sufficient, and I believe it
 " would be sufficient, to call on the party to answer."

Addison's Pennsylvania Reports, Appendix, p. 38.

The significance of this statement is the fact that a present-
 ment may be based upon knowledge derived by the Grand
 Jury from the examination of witnesses as well as from their
 own personal knowledge. Knowledge of that kind cannot be
 obtained in any manner other than by an inquisitorial proceed-
 ing where the Grand Jury endeavors, upon the suggestion that
 a crime has been committed, to ascertain whether that is a fact
 and, if so, who committed it.

In 1795 Judge IREDELL, of the United States Circuit Court,
 said, in *United States vs. Mundel*, 8 Va. (6 Call.), 245-247 :

" And it is incident to the nature and constitution
 of the grand jury to indict when they receive *informa-*
tion of a crime. The latter was said to be a present-
 ment merely, and not an indictment ; but that is not
 strictly correct : For the difference between them is this,
 If the grand jury present of their own knowledge, it is
 a presentment only ; but, if on the knowledge of others,
 it is an indictment."

This utterance was relied upon below by the appellant as
 authority for his contention ; but it has no such tendency. It
 merely refers to the original distinction between a presentment
 and an indictment, but it does not declare that a Grand Jury

may not base a presentment upon information received from others. Indeed, the rest of the Judge's opinion seems to indicate that he entertains no such narrow view. The question involved was whether the indictment was valid when the name of the prosecutor was not written at its foot according to the direction of a statute of the State of Virginia. The Court held that that statute only related to a prosecution at the instance of an individual, and said that that did

"not prevent the attorney for the public from preferring
 "an indictment *ex officio*; or the grand jury from find-
 "ing one of their own accord. For, besides the authority
 "which the attorney had at common law, which is not
 "taken away by the state statute, the act of congress
 "makes it his duty, if he sees cause, to prosecute, *ex*
 "*officio*, 'all delinquents for crimes and offences, cogniz-
 "'able, under the authority of the United States,' Act
 "September, 1789, cap. 20, s. 35: And it is incident to
 "the nature and constitution of the grand jury to
 "indict *when they receive information of a crime.*"

From the context it is evident that instead of meaning what the appellant contends, the Court intended to express the opinion that the Grand Jury had power both to present and to indict upon information obtained by them of their own motion from any source, which, of course, is the basis for the inquisitorial power contended for.

In 1829 in the case of *Ward vs. State*, 2 Missouri, 120 (marginal paging), a witness was called before the Grand Jury and questioned as to "What person or persons have so bet on
 "faro other than himself and not naming himself." The Supreme Court said, referring to objections made to such questions:

"The first in order is, that the grand jury have no
 "right to interrogate a witness in this general way;
 "but that an indictment should have been drawn up,
 "charging some particular persons with crimes, and
 "that the witness should then be required to give his
 "testimony as to the matter of the indictment. Other-

“ wise the grand jury may send for every person in
 “ the county, and inquire generally of each if he
 “ knows of any offences against law; and that this
 “ would be oppressive to witnesses, and dangerous to
 “ citizens.

“ The first answer to this is, that it is the duty of
 “ the grand jury to inquire diligently of all offences
 “ against law. Now if it should ever happen that a
 “ grand jury should determine to have summoned
 “ every person in the county, with a view to make the
 “ experiment, if perchance they might find out some
 “ offense, I have no doubt that it would be the duty of
 “ the Court to withhold its process and stop such a
 “ course. This would be an abuse of power.

“ The next answer to this is, that no such case ap-
 “ pears by the record. I take this case to be an ordi-
 “ nary case, when perhaps the jury had *probable cause*
 “ *to believe that some offences had been committed*
 “ *against law*; and that so believing, they desired in
 “ discharge of their oaths, and of their duties to their
 “ country, to inquire; and how should they inquire?
 “ Not by going into the secret recesses of gamblers and
 “ gambling devices, to ask and seek information, but to
 “ send for persons who might, in their opinion, be most
 “ likely to possess evidence relating to these matters.
 “ It is a solemn and important duty that every citizen
 “ owes to his country, to give evidence in Courts of
 “ Justice against offenders against the peace and good
 “ order of the community. A grand jury should be
 “ considered trustworthy in this matter. They stand
 “ as a rampart between the malicious or incensed prose-
 “ cution in case of life and death; no man can be
 “ brought to trial, on the lowest or the highest offences
 “ known to the law, unless the grand jury shall say so;
 “ yet they are not to be trusted with the power to send
 “ for witnesses, till some malignant prosecutor or some
 “ injured person shall cause an indictment to be sent up
 “ to them. This would strip them of their greatest
 “ utility, would convert them into a mere engine, to be
 “ acted upon by Circuit Attorneys or those who might
 “ choose to use them. This point is untenable.”

In 1831 Daniel Davis, then Solicitor General of the State of Massachusetts, a public prosecutor of experience, published a book on "*Precedents of Indictments*," to which was prefixed a treatise upon the general subject. At page 2, Mr. Davis says, commenting upon the form of the grand jurors' oath :

"The offences, which the grand jury may make the subjects of their inquiry, are not, strictly speaking, restricted to those which may be enumerated in the charge of the court. Some offences may have been committed during the session of the court, after the grand jury have received their charge, and before they are dismissed. In these cases they have the same right to examine and present them, as though they had been specially directed concerning them, in the charge of the court; and where an offence has come to the knowledge of any of the body, it is their duty to communicate it to the grand jury, that such proceeding may be had as they may think their duty requires."

At page 18 he continues in relation to the mode of procedure before the Grand Jury :

"This mode varies, in some respects, in the different States, and from the practice in England. In the latter country, the prosecutor must cause his bill to be prepared and engrossed on parchment, before it is preferred to the grand jury. In the States of New York, Massachusetts, and, probably, in most of the United States, the bill is not drawn or preferred until after the examination of the witnesses by the grand jury, nor until after it has been ordered. This is undoubtedly the most rational and convenient course. Indeed, no bill can be correctly or safely drawn, until the state of the evidence, upon which it is found and is to be supported, has been minutely examined, and is thoroughly understood. Guilty persons often escape, and public prosecutions are often defeated, from negligence or misinformation as to the minute state of facts in the cases examined. This fact nat-

" usually suggests the inquiry, What is the duty of the
 " grand jury, and of the public prosecutor, in this
 " stage of a public prosecution ? "

And in relation to the drawing of the indictment it is said
 on page 28 :

" The distinctions and difficulties above stated (of
 " indictments failing on account of technicalities), may
 " be, and are avoided, in all cases where the indictment
 " is not drawn and presented, until after the grand
 " jury have heard and considered all the evidence, and
 " *have decided upon the offence for which the bill is to*
 " *be found.* In such case, the bill is always drawn
 " *conformably to the evidence*, and may contain as
 " many counts as the nature of such evidence will
 " justify, and may render expedient. Such is and has
 " been the practice in Massachusetts and other States,
 " and is found to be most convenient, and strictly con-
 " formable to the nature of criminal proceeding."

The next reported case is *State vs. Freeman*, 13 N. H., 488,
 decided in 1842, where the question arose as to whether
 the omission of the words "a true bill" from the
 indictment invalidated the proceeding, the whole subject
 was fully considered. After referring at length to the practice
 in England the Court said :

" But here the practice is essentially different. No bill
 " is drawn up by a private person, in the first instance,
 " and laid before the grand jury with evidence to sup-
 " port it. Witnesses are first examined before the
 " grand jury, *who then determine whether the evidence be*
 " *sufficient to authorize them to prefer a criminal charge*
 " *against the accused.* If they think it is, an indictment
 " is drafted by the attorney-general or solicitor, and
 " signed by him. This proceeding is not like a charge
 " made by some other person, and laid before them for
 " their approval; but the indictment is the result, in
 " legal form, of their deliberations. The reason for the
 " English form does not exist, for it is unnecessary that
 " they should certify that their own proceedings are

"true. There is, strictly speaking, no bill to be certified to be correct in our practice,—the distinction between a bill and an indictment which arises in England from their forms not being necessary here. *With us, the accusation does not take the form, first of a bill, and then of an indictment, but it exists only as the latter.*" * * *

Up to this time there had not been in any Court in this country a judicial expression which attempted to limit the inquisitorial powers of the grand jury, except in the case of *State vs. Smith*, Meigs, p. 99, decided in 1838, but the decision in that case is not significant or important, as we shall point out hereafter, for the reason that certain early statutes of the State of Tennessee expressly limited the power of the Grand Jury. In 1845, however, in the case of *Lloyd vs. Carpenter*, decided in Pennsylvania, there appeared the first well considered expression of any American Court showing a tendency at variance with the view expressed by Judge ADDISON, in the same State, fifty-four years before. We shall refer to this case below.

It thus appears that at the date of the adoption of the Fifth Amendment and for fifty years thereafter under the procedure sanctioned by usage and precedent an American Grand Jury (1) could proceed in cases other than those in which a private prosecutor presented a duly engrossed indictment, and (2) on its own motion or at the instance of the Court or the prosecuting attorney, could (and necessarily by an inquisitorial method) investigate an alleged or suspected crime and *after* the investigation direct an indictment to be drawn in accordance with the evidence.

(b) *Mr. Justice Catron's View.*

After the decision in the *Mundel* case in 1795 the questions under consideration were not again discussed by any Federal Court until they came up in a case before Mr. Justice CATRON, of the Supreme Court of the United States, presiding in the Circuit Court for the Middle District of Tennessee. In that case the Grand Jury, without the agency of the District Attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition.

The question was brought before Mr. Justice CATRON, who sustained the legality of the proceeding and compelled the witnesses to answer. His opinion is reported in a note to Section 337 of the Eighth Edition of Wharton's Criminal Pleading and Practice, and is as follows :

" The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses ; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime. If a grand juror was a witness, he would be bound to give the information to his fellow-jurors voluntarily, as his oath requires him to do so. And so also the general oath taken in court by a witness, who comes before a grand jury, imposes upon him the obligation to answer such legal questions as are propounded by the jury, to the end of ascertaining crimes and offences (and their perpetrators) that the jurors suppose to have been committed. If general inquiries could not be made by the grand jury, neither the offence nor the offender could be reached in many instances where common law jurisdiction is exercised. In the federal courts such instances rarely occur ; still they have happened in this circuit, in cases where gangs of counterfeiters were sought to be detected ; but especially in cases where spirituous liquors had been introduced among the Indians residing west of the Missouri River. That drunkenness, riots, and occasionally murder, had been committed by Indians who were intoxicated was notorious ; but who had introduced the intoxicating spirits into the Indian country was unknown. The fact of introduction was the crime punishable by act of Congress. In the Missouri District many such cases have arisen ; there the grand jury is instructed, as of course, to ascertain who did the criminal act. The fact and the offender it is their duty to ascertain ; and these they do ascertain constantly, by general inquiries of witnesses, whether they know that spirituous liquors

" have been introduced into the Indian country ; and, sec-
 " ondly, who introduced them. It is part of the oath
 " of the grand jury to inquire of matters given them in
 " charge by the court, and to present as criminal such
 " acts as the court charges them to be crimes or offences
 " indictable by the laws of the United States. And in
 " executing the charge it is lawful for the grand jury—
 " and it is its duty—to search out the crime by ques-
 " tions to witnesses of a general character. The ques-
 " tions propounded by the jury in this instance, and
 " presented to the court for our opinion, are in sub-
 " stance: ' Please to state what you may know of any
 " ' person or persons in the city of Nashville, who have
 " ' begun or have set on foot, or who have provided the
 " ' means for a military expedition from hence against
 " ' the island of Cuba. 2d. Or of any person who has
 " ' subscribed any amount of money to fit out such an
 " ' expedition. 3d. Or do you know of any person who
 " ' has procured anyone to enlist as a soldier in a
 " ' military expedition to be carried on from hence
 " ' against the island of Cuba? 4th. Or of any person
 " ' asking subscriptions for, or enlisting as soldiers in,
 " ' a military expedition to be carried on from hence
 " ' against the island of Cuba? '

" As all these questions tend fairly and directly to
 " establish some one of the offences made indictable by
 " the Act of 1818, and are pertinent to the charge de-
 " livered to the grand jury, they may be properly pro-
 " pounded to the witness under examination, and he is
 " bound to answer any or all of them, unless the answer
 " would tend to establish that the witness was himself
 " guilty according to the act of Congress.

" This doctrine is believed to be in conformity to
 " the former practice of the state Circuit Courts of Ten-
 " nessee, and is assuredly so according to the practice
 " in other States, as will be seen by the opinions of the
 " Supreme Courts and circuit judges found in Whart.
 " Crim. Law, 3d ed., c. 6."

After Justice CATRON's decision in 1851, the practice of
 Grand Juries and the decisions of the State and Federal

Courts continued to recognize broad inquisitorial powers in a Grand Jury. Exceptions to the general trend of American authorities appear only in some of the decisions in Tennessee, one in North Carolina, one in the United States District Court in that State, and one in Georgia, besides decisions in Pennsylvania, to one of which we have already referred.

(c) In the Federal Courts.

The most comprehensive judicial utterance of a Federal Judge upon this subject is the much quoted charge delivered by the late Justice FIELD to a Grand Jury in California. He said (30 Fed. Cas., 994 ; 2 Sawyer, 667) :

“ We return now to the inquiry as to what matters you can direct your investigation beyond those which are brought to your notice by the district attorney. Your oath requires you to diligently inquire, and true presentment make, ‘ of such articles, matters and things as shall be given you in charge, or otherwise come to your knowledge touching the present service.’

“ The first designation of subjects of inquiry are those which shall be given you in charge ; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall ‘ otherwise come to your knowledge touching the present service ;’ this means those matters within the sphere of and relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court or submitted to your consideration by the district attorney.

“ But how come to your knowledge ?

“ Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury.

"Some of you also may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action corruptly or improperly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney.

"But unless knowledge is acquired in one of these ways, it cannot be considered as the basis for any action on your part.

"We, therefore, instruct you that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates."

It will be observed that the limitations placed by Mr. Justice FIELD upon the inquisitorial powers of the Grand Jury do not relate to matters brought to their attention either by the Court or by the District Attorney, and that they permit a general investigation of a crime upon the "personal knowledge" of a juror, where such knowledge goes no further than to include "facts which tend to show" that a crime has been committed, which, of course, implies the power to call witnesses other than the grand juror having such knowledge.

In *United States vs. Kimball*, 117 Fed. Rep., 156, the Federal Grand Jury in New York City undertook an investigation of the transactions of the Seventh National Bank with the object of discovering whether its affairs had been lawfully conducted. At the time of the investigation no specific charges had been brought against any particular persons. In fact, the

Grand Jury did not even know whether a crime had been committed. On a motion to quash the indictment on the ground that the person indicted had given evidence against himself before the Grand Jury, Judge THOMAS said (p. 161) :

" An important national bank had failed, and the cause did not appear. No person could be brought before a magistrate, because no one was accused, and, so far as appears, no one was known or suspected, nor had it been ascertained whether the failure arose from criminal acts or the misfortunes of business. *The investigation was intended to discover facts, and determine whether such facts showed that an offense had probably been committed. The proceeding was mere investigation, directed to discovery, not aimed at specific individuals. But, as the defendants show by pertinent authority, upon the evidence taken at any and all times before it, a grand jury may select probable offenders and find indictments against them.*"

In *Frisbie vs. United States*, 157 U. S., 160, the question was whether it was necessary that an indictment should be endorsed "a true bill." An examination of the practice in this country relating to indictments was involved and Mr. Justice BREWER, writing the opinion of this Court, said (p. 163) :

" It may be conceded that in the mother country, formerly at least, such indorsement and authentication were essential. * * * (Citing an English case.) But this grew out of the practice which there obtained. The bills of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and indicated their action by the indorsement, 'a true bill,' or 'ignoramus,' or sometimes, in lieu of the latter, 'not found,' and all the bills thus acted upon were returned by the grand jury to the court. In this way the indorsement became the evidence, if not the only evidence, to the courts of their action. *But in this country the common practice is for the grand jury to investigate any alleged*

"crime, no matter how or by whom suggested to them,
 "and after determining that the evidence is sufficient to
 "justify putting the party suspected on trial, to direct the
 "preparation of the formal charge or indictment."

To substantially the same effect is Judge NELSON's opinion in *United States vs. Reed*, 27 Fed. Cas., 737.

In *United States vs. Terry*, 39 Fed. Rep., 355, the Court said, at page 359:

"The district attorney informs the grand jury of the
 "nature of the charge, and calls their attention to the
 "provisions of the statutes supposed to have been
 "violated. The witnesses are then produced and
 "examined, and it is only when the jury are satisfied
 "that the offense has been committed by the accused
 "that the district attorney is directed to prepare the
 "formal indictment."

See, also, *United States vs. McAvoy*, 18 Howard's Practice (N. Y.) Reports, 380-382.

(d) *In the State Courts.*

It needs no reference to authorities to establish that the District Attorney of New York County frequently submits alleged or suspected crimes to the Grand Jury, and that they do exercise inquisitorial powers both on their own motion and on the suggestion of the District Attorney (see *Briefs for The Assistance of Grand Jurors*, published by District Attorneys Hall, Phelps and Martine in 1855, 1879 and 1887, respectively).

Counsel for the petitioner below cited the New York cases of *People ex rel. Hackley vs. Kelly*, 24 N. Y., 74, 79, and *People ex rel. Pickard vs. Sheriff*, 11 N. Y. Civ. Pro., 172, 185, as authorities to show that in theory the English practice continues, because, as was said in the *Hackley* case, "the indictment is supposed to be prepared and taken before the grand jury by the counsel prosecuting for the State; and the evidence is then given in respect to the offence charged in it." But the Court, in that case, was meeting an argument that an examination of a witness was not under an indictment within the meaning of a state statute. The decision can mean no more than that when the Grand Jury have reached a con-

clusion they return an indictment which *relates back* to the beginning of the proceeding for the purpose of sustaining an examination of a witness thereunder. This, of course, must be so. But we call attention to the significant language in the Pickard case that "the practice, however, is for the district attorney to inform the jury of the charge to be investigated, and if a bill is found, to prepare an indictment such as the jury conclude to present." This evidently contemplates the most informal and general charge, which is only to become specific after a hearing and the finding of such an indictment, "as the jury conclude to present."

Webster's case, 5 Greenleaf, 432, cited below, may be similarly commented upon.

In *State vs. Terry*, 30 Missouri, 368, the defendant indicted for perjury had been asked before the Grand Jury whether he did not know of "any person who had bet any money or property upon any game of cards within Cole County and within the twelve months then last past. Whether he, the said Henry Terry, had seen any person or persons within the twelve months then last past in Cole County bet any money or property at or upon any game played at or by means of cards, or any other game and device. Whether he, the said Henry Terry, had any knowledge whatever that the law prohibiting gaming and playing at cards for money or property had been violated by any person at all."

The Court held on the authority of *Ward vs. State, supra*, that the questions were properly asked and he was lawfully indicted for perjury for answering them untruthfully.

In *ex parte Brown*, 72 Missouri, 83, it was said (page 94):

"A grand jury has a general inquisitorial power. They may ask a witness summoned before them without reference to any particular offense which is the subject of inquiry, what he knows touching the violation of any section of the criminal code."

In *Commonwealth vs. Smyth*, 11 Cush., 473, the Court after discussing fully the English practice of first preparing the indictment proceeds as follows (page 476):

"No formal bills are ever previously prepared to be preferred before them (the Grand Jury), as in the

"English practice ; but they receive and act upon all
 "complaints which any individual may think fit to sub-
 "mit to them, and determine in what cases accusations
 "shall be made. In these decisions, they always act for
 "the commonwealth, and never for a private prosecutor.
 "Bills of indictment are drawn up by the attorney for
 "the government under their direction, and in conform-
 "ity to their decisions."

See also, *Price vs. Commonwealth*, 21 Gratt., 846,
 856.

In *State vs. Wolcott*, 21 Conn., 272-280, it is said ;

"Grand-juries * * * have a right to originate
 "charges against offenders, without forewarning them of
 "their proceedings against them. A different practice
 "may have been followed in England, and in our sister
 "states. Ours has been effective to secure the rights
 "of our citizens, and has been so long pursued as a
 "safe one, as to forbid courts to *change the law*, without
 "legislative sanction."

In *State vs. Magrath*, 44 N. J. (Law), 227, the Supreme
 Court of New Jersey (BEASLEY, C. J.), after referring to the
 English practice, said (page 229) :

"But in this state, as every practitioner is aware,
 "the mode of proceeding with respect to the particular
 "in question is very different from the practice above
 "described. In our procedures, bills are not drawn up
 "beforehand and presented for adoption or rejection by
 "the grand jury, but, to the contrary, they are drawn
 "subsequently to the investigation, and consequently
 "there are no bills in this course of law which are
 "marked 'not found.'"

In *Blaney vs. State of Maryland*, 74 Md., 153, 156, Blaney
 was indicted by the Grand Jury for murder without previous
 commitment, and he moved that the indictment be quashed on
 several grounds. The Court said of the powers of the Grand
 Jury :

"However restricted the functions of grand juries
 "may be elsewhere, we hold that in this State they

" have plenary inquisitorial powers, and may lawfully
 " themselves, and upon their own motion, originate
 " charges against offenders though no preliminary pro-
 " ceedings have been had before a magistrate, and
 " though neither the Court nor the State's Attorney
 " has laid the matter before them. The peace, the
 " government and the dignity of the State, the well-
 " being of society and the security of the individual
 " demand, that this ancient and important attribute
 " of a grand jury should not be narrowed or interfered
 " with when legitimately exerted. That it may in some
 " instances be abused is no sufficient reason for deny-
 " ing its existence. Though far-reaching and seemingly
 " arbitrary, this power is at all times subordinate to the
 " law, and experience has taught that it is one of the
 " best means to preserve the good order of the Com-
 " monwealth and to bring the guilty to punishment."

And a Grand Jury investigating one person may indict another.

In *People vs. Northey*, 77 Cal., 618, the Court said, at page 627:

" The grand jury has within the scope of its in-
 " quiry all public offenses committed triable within its
 " county, (Pen. Code, Sec. 915) and, though it takes up
 " for examination a charge against one person, if it
 " should appear from the testimony taken on such ex-
 " amination, that sufficient reasons exist for putting
 " another person on his trial, they can and should find
 " an indictment against such other person."

Even in Pennsylvania where some restrictions not common in other jurisdictions have been imposed upon the powers of the Grand Jury acting on its own motion, their power to act at the instance of the District Attorney is recognized.

In *McCullough vs. Commonwealth*, 67 Pa. St., 30, the Supreme Court of Pennsylvania said, page 33:

" In the Federal courts, and in some of the states,
 " it has been held that the grand jury alone may call

"witnesses and institute all prosecutions of their own motion, and without the agency of the district attorney: 1 Whart. C. L., ed. 1868, ss. 453 and 458. In this state the power of the grand jury is more restricted, and the better opinion is that they can act only upon and present offences of public notoriety, and such as are within their own knowledge; such as are given to them in charge by the court, and such as are sent up to them by the district attorney."

In *Rowland vs. Commonwealth*, 82 Pa. State, 405, 408, the Court, speaking of the power of the Grand Jury to act upon the matter brought to its attention by the Prosecuting Attorney, said :

"It is thus apparent that upon considerations involving the maintenance of the public security it has been found necessary to lodge this extraordinary and delicate authority somewhere, and it is apparent also that it has been lodged in the prosecuting officer of the Commonwealth. It is to be exercised, in the ordinary case, under the supervision of the proper court of criminal jurisdiction, and in all cases its exercise is subject to their revision and approval. The action of the officer and the court could be brought here for purposes of review only when the abuse of their discretion should be found to have been both manifest and flagrant."

In *Commonwealth vs. Green*, 126 Pa. State, 531-538, it is recognized that the Courts of that State take a narrower view of the powers of a Grand Jury than that "accepted in the United States Courts," and in "most of the states."

A brief reference to the text writers will be useful.

In *Thompson and Merriam on Juries*, SECTION 615, SUBD. (2), it is said :

"These expressions of opinion (referring to authorities) bristle with evidence of the inquisitorial power of the Grand Jury to inquire of their own motion into offenses of every character punishable by the court, of which it is a component part. Nor are the reports bar-

"ren of authority to show that the Grand Jury, having
 "probable cause to suspect violations of law, may, in ac-
 "cordance with their oath, diligently inquire in respect
 "of the same. In the discharge of this duty they may
 "summon witnesses to a reasonable number, who are
 "bound to testify to their knowledge of the matter in
 "hand, with the usual limitation, of course, that they
 "shall not be required to disclose that which would im-
 "plicate themselves. * * *

"§ 612. * * * It is everywhere conceded to be
 "within the province, if not the particular function of the
 "court, to direct the attention of the Grand Jury to the
 "investigation of *such violations of law as are of common*
 "*report in the community; to enjoin a searching scrutiny*
 "*of the causes, and a presentment of persons, against*
 "*whom, in their judgment, well-founded complaints exist.*"

And in § 615, Subd. (1), the following opinion of Judge ADDISON in relation to the duties of a Grand Jury in 1792, is quoted (the italics are in the text):

"The matters, which, whether given in charge, or of
 "their own knowledge, are to be presented by the Grand
 "Jury, are *all offenses within the county.* To Grand
 "Juries is committed the preservation of the peace of
 "the county, the care of bringing to *light*, for examina-
 "tion, trial and punishment *all violence, outrage, inde-*
 "*cency and terror, everything that may occasion danger,*
 "*disturbance or dismay to the citizens.* Grand Juries
 "are *watchmen*, stationed by the laws, to survey the con-
 "duct of their fellow citizens, and inquire where, and by
 "whom, public authority has been violated, or our Con-
 "stitution or laws infringed" (Add. Pa., Appendix, 47,
 48, 36).

See, also, WHARTON'S CRIMINAL PLEADING AND PRACTICE, 8th Ed., Sec. 388.

(e) *The Contrary View.*

A dictum of Recorder GOFF in the *Matter of Morse*, 42 Misc., 664, was cited below. That case was disposed of on the ground that the record showed that the witness was being

examined, not in relation to any charge then under investigation by the Grand Jury, but in relation to an indictment for perjury already found against one Dodge. The Recorder quite properly found that the Grand Jury were without jurisdiction. The Recorder did, however, add that the power of the Grand Jury to act depended upon whether it appeared "by complaint or information or knowledge acquired that there is reason to believe that a crime has been committed. * * * There must be reason to believe that a crime of a specific character has been committed by a particular person whose name may be either known or unknown to the grand jury."

This is far from saying that there must be a written complaint, or that there must be any formulated charge. Even the rule laid down by the Recorder would be satisfied if the Grand Jury had knowledge from which they thought it probable that some one had committed a crime.

O'Hair vs. The People, 32 Ill. App., 277, was also cited below. If there is any significance in the decision in that case, it is under the peculiar statute of the State of Illinois. But as to the practice, we call the attention of the Court to the opinion of the Court, indicating the most informal and general procedure by the State's attorney before an indictment is found. The practice seems to be for the State's attorney to subpoena witnesses even before the Grand Jury is empanelled, and examine them with a view to presenting an informal charge.

In Tennessee a statute was passed in 1801, prohibiting a district attorney from preferring a bill of indictment to the Grand Jury "without a prosecutor marked thereon" (see Shannon's Annotated Code, § 7053), and the Courts have constantly withheld from Grand Juries any general powers to inquire as to crimes without such a bill before them. Statutes passed from time to time have conferred in the case of specific crimes broad inquisitorial powers upon the Grand Jury (see Section 7016, Shannon's Annotated Code), and, where attempts have been made to exercise the power in relation to offenses not specifically mentioned in these statutes the Courts have refused to uphold indictments. Perhaps these decisions may be correct under the rule obviously intended to be recognized in the Statute of 1801. But in view of the legislative

policy of the State, there has not been the same occasion for extending or modifying the common law procedure because wherever the Legislature has been of the opinion that the Grand Jury should have general inquisitorial powers, it has specifically conferred them by statute. It might well have been held under the Statute of 1801 quite irrespective of the common law rule, that there was a Legislative intent to be implied withholding the inquisitorial power from a Grand Jury in all cases where it was not expressly conferred. The subject has been dealt with in Tennessee in the following cases :

State vs. Smith, Meigs, 99.

Glenn vs. State, 1 Swan, 19.

Harrison vs. State, 4 Coldw., 195.

State vs. Robinson, 2 Lea, 114.

State vs. Adams, 2 Lea, 647.

State vs. Barnes, 5 Lea, 398.

State vs. Lee, 3 Pickle, 114.

Judge KING of the Court of Quarter Sessions in 1845 (in *Lloyd vs. Carpenter*, 5 Penn. Law Journal, 55), delivered a charge or instruction to the Grand Jury, which had made a written communication to the Court. The Grand Jury stated that it had been charged before them that two public officers had been guilty of converting to their use certain moneys. The jury asked that certain witnesses be sent for and the Court compel the production of certain books and papers. The substance of the decision of the Court is that the ordinary method of criminal procedure in the State of Pennsylvania is to proceed first before a magistrate and not until he has heard the charge to present the matter to the Grand Jury. Various reasons are adduced to show the wisdom of this method. Attention is then called to the extraordinary methods of criminal procedure: *first*, where the Court directs the Grand Jury to investigate matters of great public import; *second*, where the Attorney-General *ex officio* prefers an indictment before a Grand Jury without a previous binding over or commitment of the accused.

The Court speaks also of a presentment from the jury's own "knowledge or observation," and practically holds

that in such a case the Grand Jury's knowledge must be such as need not be fortified by the testimony of witnesses. But it will be observed that the right to institute an extraordinary proceeding before a Grand Jury (1) upon a charge of the Court or (2) at the instance of the State's Attorney or (3) in a matter of great public import, even though no indictment or formal charge is framed in advance, is not questioned and, to that extent at least, the opinion of Judge KING is not adverse to our contention. The Pennsylvania Courts have since taken a view (see cases cited above) as to the independent power of the function of the Grand Jury which is more restricted than that generally taken by the Courts of this country.

In *Lewis vs. Board of Commissioners*, 74 North Carolina, 194, 199, the English practice is more closely adhered to, and it is held that a prosecutor has the right to have a matter laid before the Grand Jury only by having the prosecuting attorney frame a bill of indictment on which shall be endorsed the name of the prosecutor.

It is also held that the solicitor has no business in the grand jury room and has no power to advise them. It is said:

"They do not communicate with the solicitor, but
 "with the court, either directly or through an officer
 "sworn for that purpose. They act upon their own
 "knowledge or observation, in making presentments.
 "They act upon bills sent from the court, with the wit-
 "nesses. The examination of witnesses is conducted by
 "them, without the advice or interference of others.
 "Their findings must be their own, uninfluenced by the
 "promptings or suggestions of others, or the opportunity
 "thereof. We know there have been wide departures
 "from the principles here announced, in this and, per-
 "haps, in other judicial districts. It has become neces-
 "sary, therefore, to review the ground, and recur to the
 "earlier and more correct practice as it was established
 "by those who have gone before us, and has been handed
 "down by tradition and the recollection of the oldest
 "members of the court."

We have quoted thus fully from this case in order to point out that in many particulars in which the common law practice has been entirely abandoned in most localities it is thus adhered to in North Carolina and particularly that the function of the prosecuting attorney is far different there from what it is in this State and generally in the Federal Courts. The decision is not, therefore, an authority of much weight in this case.

The *Lewis* case was decided in 1876 and in 1883 a question involving the powers of a grand jury came up in the Western District of North Carolina, in *United States vs. Kilpatrick*, 16 Fed. Rep., 765, and United States District Judge DICK based his decision principally upon the *Lewis* case, saying, as to the decisions of the Supreme Court of that State, that he "adopted their views as to the common law of this State, as I think such views are not in conflict with any decision of the Supreme Court of the United States, or with any positive congressional legislation."

Judge DICK decided that the prosecuting attorney has no right to go before the Grand Jury and he said that he had given permission to that officer to go before the Grand Jury only "when requested by the foreman, or when they regard their presence necessary for a speedy and proper administration of justice." But he said (page 770) that when he did permit that officer to go before the Grand Jury he could not "give opinions upon questions of law which affect the rights and liberty of the citizen charged with crime, or give any advice as to the weight and sufficiency of evidence" * * * and (p. 777) that he exercised "that privilege only by the express permission of the Court."

Although the District Judge cites with apparent approval the well-known opinion of Mr. Justice FIELD he does not seem to regard it as a statement of the correct practice.

We have referred fully to this case to show (1) that it is avowedly based upon the State practice in North Carolina and (2) that it withholds from the Grand Jury and the District Attorney powers which are generally conceded to them in other Federal Court Districts and in most of the States; and, therefore, that it is not valuable as an authority. It should be noted too in this connection that when *United States vs. Kilpatrick* was decided the *Frisbie* case had not been decided by the

Supreme Court. Judge DICK would have had difficulty in avoiding the force of that decision.

In the case of *In re Lester*, 77 Ga., 143, 148, the Mayor of Savannah, who was also a judge of the Police Court of that city, was subpoenaed to produce the records of the Court before the Grand Jury before it had been impanelled and sworn. The Court refused to commit him for contempt for disobeying the subpoena. The first and sufficient ground for the decision was that proof of the records of his Court could only be made by copies thereof duly certified by the Clerk under the seal of the Court.

The Court said that the inquisitorial powers of the Grand Jury are to be "exercised within well defined limits;" that the Grand Jury have no power "to force private persons" to state who have violated the law or "to make every man a spy upon the conduct of his neighbors and associates;" that they have no power to compel a witness to violate the confidence implied in holding social intercourse or to force him to become a public informer. These propositions were not necessary to the decision of the case. The narrow view of the Court was probably based on local practice which had grown up under the Code of Georgia and which requires the testimony of witnesses before the Grand Jury to be "in a particular case;" and the general language of the opinion as to searches and general warrants is all qualified by the following:

"In saying thus much, however, we do not intend
 "to intimate that the state's prosecuting officer may
 "not, if he sees proper to do so, make search for evi-
 "dence and secure its forthcoming by serving subpoenas
 "upon witnesses in anticipation of the impanelling and
 "qualification of the grand jury before whom the
 "matter is to be investigated."

It is difficult to see from the general language of the Court where they would place the limit upon the power of the Grand Jury for they say:

"It is the right of any citizen or of any individual of
 "lawful age to come forward and prosecute for offenses
 "against the State, or when he does not wish to become
 "the prosecutor, he may give information of the fact to

“ the grand jury, or any member of the body, and in
 “ either case it will become their duty to investigate the
 “ matter thus communicated to them, or made known to
 “ one of them, whose obligation it would be to lay his
 “ information before that body.”

But how could they “investigate the matter thus communicated to them” without calling other witnesses and thus, in the words of the Court, making each witness “a spy upon the conduct of his neighbors and associates” and compelling him “to violate the confidence implied in holding social intercourse with his fellows by forcing him to become a public informer”? Some of the most striking language of the Court would logically restrict the power of the Grand Jury to the point of impotence, but it is obvious that the Court was not prepared to go to the logical extreme and, perhaps, used the language by way of caution in a case where there was another conclusive ground for their judgment.

This review shows that by the weight of authority in the State and Federal Courts a Grand Jury has the power, and it is the common practice, to investigate, by examining witnesses, any matter or charge which may come to their attention either through personal knowledge or through statements made to them by others or which may be laid before them by the prosecuting attorney; and to postpone the framing of an indictment until it has completed such investigation.

It is claimed, however, that such investigation may not be an inquisitorial proceeding directed to ascertain whether a crime has been committed and, if so, by whom, but that any matter submitted by the District Attorney or even by the Grand Jury itself must be a specific charge against some particular person. This claim we shall now examine.

II.

A SPECIFIC CHARGE AGAINST A PARTICULAR PERSON IS NOT ESSENTIAL TO GIVE THE GRAND JURY JURISDICTION.

A general suggestion by the District Attorney that a person or corporation has been guilty of a violation of a criminal

provision of a United States statute is sufficient to justify the Grand Jury in investigating such suggestion in order to determine the time, place and circumstance of such violation.

A. A bill of indictment must be drawn with technical accuracy because the defendant is entitled to know the precise nature of the charge. When under the English practice a private prosecutor submitted to the Grand Jury a bill of indictment he was obliged to stand on that indictment. If the indictment was not found he was mulcted in costs, and, if the prosecution failed, he thus furnished evidence on which the person accused could sue him for malicious prosecution. The restraining influence of these incidents of an unsuccessful prosecution seems to have been regarded as a sufficient safeguard against abuses of this practice, although finally abuses did arise which had to be corrected by legislation (Vexatious Indictments Act of 1859, 22 and 23 Vict., c. 17). The private prosecutor conducted the prosecution set on foot by the bills prepared and submitted by him, and employed counsel at his own expense, who acted "with only slight supervision by officers of the government."

Thompson and Merriam on Juries, Sec. 609.

1 Bishop's Criminal Practice, Sec. 278.

Harris Criminal Law, (Am. ed. by Force), 288.

Indeed, until a recent date, the practice, shocking to an American's sense of propriety and justice, prevailed (and it is not prohibited now) of a law officer of the Government acting as counsel for a criminal defendant.

Reg. vs. Gurney, 11 Cox C. C., 414, 422 and 423, Note a.

Criminal prosecutions before a Grand Jury in England at the time of the establishment of the judicial system of the United States were almost always commenced by private prosecutors. But the courts of this country have never thought it wise policy to permit a private prosecutor to take any part, except as a witness, in setting the machinery of the criminal law in motion. It is believed here that the State is interested in preventing and punishing crime and that no individual citizen should have the power to determine whether a criminal proceeding should or should not be commenced and

prosecuted. Mr. Justice FIELD well expresses (*supra*) the American idea thus :

“ You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally, such parties are actuated by private enmity, and seek merely the gratification of their personal malice. If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case.”

This is a condemnation of the whole theory of the English practice. And it seems quite clear that the practice now almost universal in this country under which the public prosecuting officer initiates and supervises the proceedings before the Grand Jury removes the chief necessity, which arose in England from the intervention of a *private prosecutor*, for the formulation of a specific charge against some particular person. The presumed impartiality of the prosecuting officer and the secrecy of the proceedings which avoids the disgrace possibly attending the publicity of even unsustained charges, no doubt led to the growth in this country of the practice of Grand Juries of considering charges before they knew who was the particular person accused or the specific nature of the crime charged—that is, before they knew such date and circumstances as it would be necessary to aver in a bill of indictment presented by a private prosecutor. Even in Pennsylvania where as early as 1705 the English practice was retained by statute to the extent of requiring that the name of the prosecutor should be placed upon the indictment, it was held in 1769 that this statute did not apply where there was no real prosecutor, *i. e.*, where the prosecution took its rise from the Grand Jury, or we might add with equal reason from the prosecuting attorney.

The King vs. John Lukens, 1 Dallas, 7.

When the necessity for presenting a formal bill was done away with, a specific charge against a particular person in any other form became both illogical and unnecessary ; and neither

in England nor in this country can any authority be found that such a charge must be made.

B. We consider next the nature of the power of the Grand Jury to find an indictment upon what is generally, but, as we think, inaccurately, defined as their "own knowledge;" for to this power may be referred the broad inquisitorial procedure so common in this country. Counsel for the appellant seeks to give to these words the narrow construction limiting them to such knowledge as a witness must have before being permitted to testify to a fact—that is knowledge as distinguished from hearsay. The authorities do not sustain such a construction, and the early history of grand juries shows that the knowledge on which they could proceed to investigate was such as they acquired by rumor or common repute.

In its beginnings the Grand Jury seems to have been devised as a convenient method to assist itinerant Justices in England in detecting crime and punishing it. They seem clearly to have been expected to investigate, and originally they indicted frequently, on mere rumor.

In Pollock & Maitland's History of the English Law (Vol. 2, p. 639, 622), a description of the Grand Jury before the time of Edward I. is given, founded on Bracton and Britton :

"The ancestors of our 'grand jurors' are from the
"first neither exactly accusers, nor exactly witnesses ;
"they are to give voice to common repute."

* * * * *

"From the very first the legal forefathers of our
"grand jurors are not in the majority of cases supposed
"to be reporting crimes that they have witnessed, or even
"to be the originators of the *fama publica*. We should
"be guilty of an anachronism if we spoke of them as
" 'endorsing a bill' that is 'preferred' to them ; but
"still they are handing on and 'avowing' as their own
"a rumor that has been reported to them by others.
"* * * Some of the verdicts that are given must be
"founded upon hearsay and floating tradition."

Bracton, in his "De Corona," Twiss' Edition (Vol. 2, Chap. 22, fol. 143, Twiss' Ed., p. 451) says:

"Now, we must speak of persons indicted upon
 "common fame, which raises a presumption, and by
 "which we must hold, until the person indicted has
 "purged himself of the said suspicion. From fame
 "indeed suspicion arises, and from fame and suspicion
 "a grave presumption, nevertheless it admits of proof to
 "the contrary or of purgation."

See, also, Vol. 2, fol. 116b.

In Reeves' History of the English Law (Vol. 1, p. 457 and Vol. 2, p. 293), the author indicates the methods of accusation towards the end of the reign of Henry the Second.

"Thus, as a person indicted *per famam patriae* was
 "charged by the *patriae*, or twelve jurors elected, in the
 "manner before mentioned, who had founded the accusa-
 "tion upon their own knowledge or persuasion, collected
 "from observation or report, it became the judge, if he
 "had any doubt, or suspected the jury, to make strict
 "examination into the matter, and ask the twelve how
 "they learned what they, in their verdict, declared con-
 "cerning the person indicted, and, upon their answers,
 "he might judge whether the charge was founded in
 "truth or malice."

For further authorities, see, also,

Stephen's History of the Criminal Law of Eng-
 land, Vol. 1, p. 253.

Huband's The Grand Jury in Criminal Cases in
 Ireland, p. 8.

Britton, 22-26.

Stubbs' Constitutional History of England, Vol. 1,
 661 *et seq.*

Stubbs' Select Charters, p. 259:

Taylor's Origin and Growth of the English Consti-
 tution, p. 329.

Three or four hundred years later support is found for this view in the case of *The Earl of Macclesfield vs. Starkey*, 10 Howell's State Trials, 1330, which was decided by the Court of Exchequer in 1684.

This was a case of a presentment by a Grand Jury, based

not entirely upon their own knowledge, but upon the evidence adduced before them.

The facts of the case were briefly these: It was a time of great civil disturbance in England, just after the insurrection of the Duke of Monmouth, and the King had published a declaration concerning the conspiracy against his government. The Grand Jury sworn to inquire in the County of Chester conceived it expedient to present their apprehensions of danger from a dissatisfied party in the county, and they declared that they conceived it expedient that certain persons, naming them, should be obliged to give security for the peace, particularly the Earl of Macclesfield.

After this, the Earl of Macclesfield sued Starkey, one of the grand jurymen, for *scandalum magnatum*, claiming ten thousand pounds damages. This was an action granted under several statutes. The defendant pleaded that he, with others, naming them, according to law, in the accustomed manner, were impanelled and returned to be of the grand inquest before the justices, were sworn and charged to inquire for the King and the county of Chester "*de certis articulis ibidem eis per prefatos justiciarios traditis*" (of certain articles given over to them by the said justices) and that the defendant, and those other persons that were of the inquest "*secundum juramenti sui debitum, et secundum evidenciam et testimonium eis ibidem exhibitum de prefato comite ac juxta eorum conscientias ac ad conservandam pacem, etc., debito modo presentaverunt*" (upon their oath, and in accordance with the evidence and the testimony concerning the said Knight given before them, and obeying their consciences, and in order to maintain the peace, etc., did present in the accustomed manner).

The plaintiff contended that the whole action of the Grand Jury was void and irregular and that, therefore, an action would lie against them, in spite of the fact that they were grand jurymen. The decision of the Court, however, was unanimous for the defendant. The argument for the defendant, before the barons of the Court of Exchequer, was made by Mr. John Holt, who is said in the report of the case to have probably been the lawyer who afterwards became famous as Chief Justice of England. Mr. Holt argued (p. 1356):

" I think it will be easily agreed to me, that it is not
" necessary for the grand jury, to stay till an indictment

" be drawn up by an officer or other person in form, and
 " in Latin, and so in their inquiry to confine themselves
 " only to such bills of indictment as are prepared and
 " presented in form to them; but they are to enquire
 " and presentment make of all things that are given
 " them in charge, and the court they present unto hath
 " consueance of, that they have any notice or knowl-
 " edge of themselves, *or, are informed by any person,*
 " and this without doubt they may do: and it is the
 " constant universal practice of grand juries after they
 " have dispatched the bills that are brought to them in
 " form, they go and consult amongst themselves what
 " they know of their own knowledge, *or are informed of,*
 " concerning any of the matters relating to the business
 " of the country within their charge and authority, and
 " according as upon enquiry they find matter to present,
 " they do present it to the court, and that very often
 " without the strict form in paper and in English; this
 " is done by them every assizes and sessions.

" And what is the effect of this? why what is
 " double, the officer of the court receiveth the present-
 " ment and draws up a bill upon the matter presented
 " into form, which the jury find as an indictment, or
 " else it is used as evidence to another grand jury, the
 " next assizes or sessions, to find a bill of indictment
 " upon, and commonly indeed this latter way is taken:
 " the clerk of the assize, or clerk of the peace, reserves
 " these informal presentments as evidence for a succeed-
 " ing grand jury, to find bills by him drawn up there-
 " upon. Now, my lord, this being the practice all over
 " England, I know not why it should come to be a fault
 " in our case, to do it here. * * *

" My lord, with submission it is not necessary for
 " justices of Oyer and Terminer to enquire always by
 " indictment. They have another way, and that by the
 " express words of their commission '*per sacramentum*
 " '*proborum et Legalium Hominum de Comitatu ac alijs*
 " '*viis Modis et Medijs quibus melius sciverint per quos,*
 " '*rei veritas melius sciri poterit*' (by the oath of good
 " and lawful men of the county, and by whatever other
 " ways and means, which may be better known to them
 " (by which) the truth of the matter may be more

"surely discovered) of those offenses of which
 "they have conusance, so that it is not necessary
 "that the proceedings and informations of a Grand-
 "jury to all intents and purposes, should be by indictment, for the very commission gives authority to
 "make inquiry as well by other means and ways where-
 "by the truth may best be known, as by the oaths of
 "honest and lawful men. If then they have authority
 "to enquire by other ways and means, surely the way
 "of presentments, and desire to take security of the
 "peace as occasion shall be, is a good and legal way of
 "proceeding; and surely, if it be considered it will
 "appear to be a very merciful presentment to desire
 "only security of the peace in such matters as are
 "therein contained."

Holt, in his argument, continually dwells upon the point that the Grand Jury represents the county and stands guarding the interests of the public. On page 1362, after noting that individuals, on proper cause, may require other individuals to be pledged to give security for the peace, he continues :

"And is not then the fear of a whole county, cause
 "to have such persons, as they apprehend danger from,
 "bound to the peace. And is not the fear of a grand
 "jury that represents the county declared in their pre-
 "sentment upon oath, a legal ground to demand secur-
 "ity for the peace? If private men upon their private
 "fears may desire and ought to be secured, I think the
 "county upon their public fears much more."

On page 1371, reciting the necessities of the occasion, he states :

"When there hath been a horrid conspiracy and
 "treason discovered, of which some that are accused
 "are attainted and executed, others fled, and among
 "them the principal person, who not long before had,
 "with a very great number of gentry and others, come
 "into the country, and there had been on that account
 "a tumultuous disorderly assembly, why should it not
 "be rational for a grand jury in such a juncture to
 "apprehend these things might be dangerous to the

" country ? And if they do apprehend them dangerous,
 " they are obliged by their oaths, and bound by the
 " duty they owe to God and the king, and by the trust
 " that is reposed in them, as inquisitors for their country,
 " to make such prudent and discreet representations of
 " their fears, and the grounds and reasons of them, to
 " the court, before whom they are sworn, and that can
 " apply proper remedy ; in order to get security for the
 " preservation of the peace, and therein as far as in
 " them lies, secure the government and prevent the
 " dangers, that in their apprehensions threaten it."

And again Mr. HOLT proceeds :

" It is the oath of a grand jurymen, ' you shall dili-
 " gently inquire and true presentment make of all such
 " things as shall be given you in charge,' &c., but I
 " think it is seldom known that all the articles of which
 " the court hath conusance, or the jury power and
 " authority to enquire and present upon, are given in
 " charge ; but commonly the judge gives those in his
 " charge that are the most material.

" Then the case comes to this, here is perhaps an
 " article omitted in the charge, but that is a matter of
 " which that court hath conusance and which by the
 " law is inquirable of by the jury, and they do enquire
 " upon it, and present. May they do this ? Yes, sure,
 " and it is done most unquestionably every day ; if it
 " be an article within the judge's power and commis-
 " sion to hear and determine, they ought to do it by
 " their oaths, and it can be no satisfaction to the con-
 " science or integrity of a grand jurymen, that because
 " the judge omitted to give that matter in charge, he
 " should neglect the trust reposed in him to present
 " mischief and danger to his king and country. It is
 " justifiable certainly to present in such a case, and
 " therefore the particular articles need not be set forth,
 " for if they were, perhaps the thing presented was
 " not one of them, and yet the presentment might be
 " legal."

It is worth noting that, in this presentment, *no charge was brought against any particular person even by the presentment.* Against no person was an accusation brought which he could answer. The Grand Jury simply stated that they deemed it advisable, for the interests and security of the public, that certain persons should be obliged to give security for the peace. It is true that the names of the persons were given whom they suggested should be treated in this manner, but the accusation was not one to which a plea could be made, or which could be tried in court.

These references serve to show that the narrow construction given to the rule that a Grand Jury may act only on the personal knowledge of its members has no foundation in the early history of the institution. It may be that by the development of the conditions of Anglo-Saxon civilization it has come to be the practice not to act as in the olden time on mere rumor, but it is equally certain that no support is found in the history of the institution for applying to "personal knowledge" the narrow meaning sometimes given it. A middle ground not susceptible of exact definition is the result of modern conditions of civilization; and it is probably expressed as definitely as practicable in the words of Justice FIELD, where, in construing the part of the oath to the Grand Jurors which required them to inquire in relation to matters which might "otherwise come to your knowledge touching the present service," he said that this referred to matters other than those called to their attention by the Court or District Attorney and from which they acquired knowledge "*from evidence before you.*" Here is involved the power to *investigate a matter* but not to find an indictment *except on evidence of witnesses.*

The procedure in this country where a Grand Jury without the previous submission of a formal indictment, makes an investigation either (1) on their own motion or (2) on the charge of the Court or (3) on the suggestion of the District Attorney presents in all essential features the same situation as those existing where under the English practice a Grand Jury proceeded with a view to making a presentment; and the powers of inquisition which we find exercised under a radically

different procedure adapted to the conditions in this country are no doubt to be attributed to the powers always conceded to a Grand Jury conducting an investigation preliminary to making a presentment. And if the *power* exists the proper manner of its exercise is to be sought not in the English but rather in the American precedents.

C. A specific charge against a particular person involves definiteness. But are date and circumstance and the technical accuracy characteristic of an indictment necessary to the exercise of jurisdiction by the Grand Jury? Clearly not. For if it were it would necessarily follow that a person indicted could inquire into the proceedings, and if it was found that they did not originate in a specific charge the indictment must be quashed for that technicality, even though it charged a crime sufficiently established by the evidence before the Grand Jury.

Furthermore, a witness could object to answering a question because he claimed that the proceeding was not properly inaugurated; and on such an objection he could demand a ruling by the Court as to whether under the charge presented to the Grand Jury the question was admissible; and thus an investigation begun before the Grand Jury would soon assume the aspect of a trial in Court, subverting the whole purpose of the Grand Jury system and seriously affecting the administration of justice.

Moreover, if an oral or written charge be necessary it could be amended from time to time as evidence might be produced justifying such amendment; or, if the point were raised that the Grand Jury had proceeded without a sufficiently definite charge it would be a very simple matter to make a charge and a second time introduce the same evidence and reach the same result. But the law would avoid all such circumlocutions.

It is quite obvious that, from the nature of the case, the whole matter must be in the hands of the Grand Jury itself and they must have the power to prescribe the method in which they will proceed.

D. The contention of the appellant would necessarily lead to the violation of the rule that the proceedings of the Grand Jury are to be kept secret. If a formal charge is neces-

sary to the jurisdiction of a Grand Jury a witness (and a *fortiori* the accused) would be entitled to ask before he is compelled to testify what the charge was and to examine it to see if it was technically sufficient. But that would be a disclosure of the secrets of the jury room which has never been permitted anywhere. And if the claim of the appellant be conceded that a charge be necessary, it must also follow that he has the right to object to the admissibility of evidence on the ground that it is not competent under the charge. But there are abundant authorities in the Federal Courts to the effect (1) that the granting of such a right would necessarily result in a violation of the secrecy of the proceedings of the Grand Jury and (2) that a witness has no right to question the regularity of the proceedings of a Grand Jury.

In *United States vs. Brown*, 1 Sawy., 533 (Fed. Cas. 14,671), the Court said at page 1274 :

" Neither the motion to set aside, nor the motion to
 " quash, will lie where the objection does not appear or
 " arise upon the face of the indictment, or perhaps the
 " records of the court. This being so, the affidavits of
 " the defendants impugning the conduct and judgment
 " of the grand jury, cannot be considered on the hear-
 " ing of this motion. If the contrary practice were
 " established, there would be no need of grand juries,
 " and the court would necessarily assume both the
 " function of indicting and trying criminals ; for it
 " is safe to presume that in most cases the defend-
 " ant would object to being tried upon the indictment,
 " and support such objection by his affidavit that he be-
 " lieved the grand jury acted upon incompetent or in-
 " sufficient evidence. The wit of man could not devise
 " a mode of indicting which would not be liable to this
 " objection from the defendant."

In *McGregor vs. United States*, 134 Fed. Rep., 187, the plaintiff-in-error based his appeal, in part, on alleged error of the Court below in refusing to quash the indictment because of "illegal and inadmissible testimony" received by the Grand Jury, and it was claimed that no legal or competent

evidence was received by the Grand Jury. The Circuit Court of Appeals held (p. 192):

"This motion was simply an effort to revise the judgment of the grand jury, and was in fact an appeal from the jury to the court for the purpose of determining whether or not the jury acted upon sufficient proof in finding the indictment. We have not been favored by counsel with any authority justifying such a procedure as was asked for concerning this matter in the court below, and if any case exists where such a course has been followed we are unable to find it. * * *

"It is doubtless true that grand juries frequently consider testimony that would be held inadmissible by a trial court, for such juries are not usually well informed concerning the rules of evidence, nor the rights and privileges of the parties whose alleged offenses they are examining into. Such incompetent evidence, if subsequently offered at the trial, would be excluded, or, if admitted, would by an appellate court be held to be error, and any judgment founded thereon would be reversed. In cases like this, where the record discloses that many witnesses were examined, and much documentary evidence considered by the grand jury, it is quite apparent that it would be subversive of our criminal procedure, and destructive of the rules formulated to promote the due administration of justice, to establish a practice under which indictments might be quashed because of the consideration by the grand jury of the improper testimony given by one witness among many, or the reading by such jury of a statement irregularly submitted to it, which may likely have had but little influence in the conclusion reached by the jury"

"* * * The proceedings before a grand jury should always be conducted in secret, and should not be made public, unless in those peculiar and rare instances in which the ends of justice imperatively require it; this case, in our opinion, not being of that class."

In *United States vs. Cobban* 127 Fed. Rep., 713, upon pleas filed by the defendant to several indictments found against him, the Court said (p. 718) :

"The remaining pleas are based upon the testimony presented to and the proceedings had before the jury, and directly raise the question of the right of the court to investigate and consider such testimony and proceedings. * * *

"Clearly, this involves an investigation of the testimony produced before the jury, and a determination of its relevancy and sufficiency. If it be admitted that any of the testimony can be reproduced, then it all must be, if the defendant demands it, for there is no possible place in principle to draw the line between that which shall and that which shall not be received. We thus have the spectacle of the court sitting as one of error and review upon the case as heard before the grand jury, and this upon the sole demand of the defendant. I confess this is contrary to all my conceptions of the practice, and, if established, must lead to the miscarriage of justice. All that secrecy of investigation, which, for ages, has been associated with the grand jury system, and which has been deemed an efficient means of its successful operation, is swept away and all its proceedings must be made, if the defendant so wills, as public as those of a town meeting. * * * To establish this rule of inquiry, and carry it to its legitimate conclusion, would, in my opinion, result in a shield to crime, for which, it must be admitted, there are already many avenues of escape."

See, also,

United States vs. Farrington, 5 Fed. Rep., 343, at p. 347.

United States vs. Perry, 39 Fed. Rep., 355.

United States vs. Reed, 2 Blatchf., 435, at p. 466.

United States vs. Ambrose, 3 Fed. Rep., 283.

If the appellant had presented facts showing that his constitutional rights were endangered, the Court might well have inquired generally, whether, from the facts which the Grand

Jury deemed it advisable to disclose, and from the presumptions which the Court would indulge, the Grand Jury was transcending its power. But the record does not show that any such danger existed. The statement of the Assistant District Attorney, acquiesced in, and adopted by, the Grand Jury, was that the proceeding was under the so-called "Sherman Act," and that, in testifying, the witness would be exempted under the Immunity Act of 1903. How could it be practicable or proper that more than this should appear in order to protect the witness in the exercise of his constitutional privilege? Even if it had been necessary to make a charge, setting forth the date and circumstance of the alleged crime, it would have been inconsistent with the duty of the Grand Jury to make a more complete disclosure as to what it was; for, by putting into the possession of an officer of one of the defendants facts which that defendant was not, before an indictment was found, entitled to know, they would have defeated the chief object of the rule of secrecy which a Grand Jury is bound to observe. If a charge more specific than that which may be fairly inferred from the statement of the District Attorney be necessary, the Court will presume that it was made. In other words, the Court will presume that both the Grand Jury and the District Attorney proceeded in accordance with their sworn duties and in accordance with law.

In *United States vs. Terry*, 39 Fed. Rep., 355, the Court said, at page 359:

"The usual, and, I believe, invariable, method of procedure in cases submitted to grand juries in this court must, in the absence of any averment or suggestions to the contrary, be presumed to have been followed. The district attorney informs the grand jury of the nature of the charge and calls their attention to the provisions of the statutes supposed to have been violated. The witnesses are then produced and examined, and it is only when the jury are satisfied that the offense has been committed by the accused that the district attorney is directed to prepare the formal indictment."

In a similar case (*United States vs. Hunter*, 15 Fed. Rep., 712) the Court said, at page 714 :

" The district attorney is an officer of the court, and
 " who cannot be presumed to be influenced by any de-
 " sign only to enforce and vindicate the law, hence his
 " statements must be relied upon by the court as true,
 " and induced only by a proper sense of official duty."

And in *United States vs. Reed*, 2 Blatchf., 435, at page 466, the Court said :

" No case has been cited, nor have we been able to
 " find any, furnishing an authority for looking into and
 " revising the judgment of the grand jury upon the evi-
 " dence, for the purpose of determining whether or not
 " the finding was founded upon sufficient proof, or
 " whether there was a deficiency in respect to any part
 " of the complaint; and the grounds and reasons which
 " we have briefly alluded to, account sufficiently for the
 " absence of any such precedent. * * * In the ad-
 " ministration of criminal justice, confidence must be
 " reposed somewhere; and it must be admitted that
 " there are few bodies concerned in it that may be
 " more safely trusted than the grand inquest of the
 " county."

It will also be assumed, if necessary, that the matter before the Grand Jury was laid before it by the District Attorney. Judge WALLACE, in his opinion below (Record, p. 30), said : " In the present case it does not appear that the investigation was initiated *sua sponte* by the grand jury, and it may be inferred from the participation of the United States attorney in the proceeding that it originated in his informal presentation of the charge to them." And if the charge did originate with the Grand Jury, it will be assumed that the District Attorney acquiesced in and adopted their act (*United States vs. McAvoy*, 18 How. Pr., N. Y., 380-382).

E. If the Assistant District Attorney, representing the United States, before the witness was called upon to testify, had

presented to the Grand Jury a charge, stating that he was in possession of information which led him to believe that there had been a violation of Section 1 of the Anti-Trust Law, in that the two defendants at a particular time had entered into a combination in restraint of interstate trade, that certainly would have constituted, under any reasonable rule, a sufficient charge to justify the Grand Jury in acting. While the record here does not show any such statement, yet the Assistant District Attorney did state that a proceeding was pending under the Anti-Trust Law; and it was not necessary to go further; for, in view of the statement of the character of the questions asked and documentary testimony called for, it is impossible that, in any prosecution of the witness on account of his testimony, it could successfully be claimed that the hearing before the Grand Jury did not relate to the Anti-Trust Law, but did, in fact, relate to a charge under some other statute which did not, like the Anti-Trust Law, afford to the petitioner immunity from prosecution. This, really, should be the test as to whether the petitioner's rights as a witness before the Grand Jury have been properly safeguarded.

Moreover, the attitude of the witness showed that he regarded the evidence called for as material, for he objected on the ground that it would incriminate him. He could not interpose that objection capriciously; to make it available, the possibility of crimination must have appeared from the circumstances (*Burr's Trial*, Federal Cases No. 14692e; *U. S. vs. McCarty*, 21 Blatchford, 469; *Ex parte Irvine*, 74 Fed. Rep., 954; *Wigmore on Evidence*, section 2271). The record of the proceedings discloses no possibility of crimination, except under the criminal provisions of the Anti-Trust law; and, if the evidence had that tendency, it must have been material to the inquiry. And, if that be so, a witness should not be permitted to raise an objection that all the technicalities of Grand Jury practice have not been complied with.

F. It is doubtful whether, except in a most extreme case, a witness has any right at all to raise such objections as those raised here, and certainly not unless it clearly appears that his constitutional rights are in danger. A witness before a Grand Jury has no right to inquire whether that body is properly constituted and a lawful body.

In *ex parte Haymond*, 91 California, 545, a witness subpoenaed before a Grand Jury refused to appear and testify on the ground that the jury was not a lawful body. He was convicted of contempt and sentenced to fine and imprisonment. He sued out a writ of *habeas corpus*. He contended that the record of the proceedings in ordering, selecting, summoning and impanelling the Grand Jury showed the greatest irregularity and a violation of plain statutory provisions.

The Court held that the petitioner, on his own showing, was regularly and properly convicted, and said (p. 547) :

" Without passing upon the question whether the
 " Grand Jury before whom the petitioner was summoned to appear was impanelled in accordance with
 " the provisions of the law relating to that subject, it is
 " sufficient for us to say that such a body has certainly
 " a *de facto* existence, and, this being so, the witness
 " was clearly guilty of contempt in refusing to testify.

" When a court having legal authority to impanel a
 " grand jury has sworn and impanelled a competent
 " number of persons as such, and itself recognizing the
 " body so formed as a lawful grand jury, charges it with
 " the duties of a grand jury, and it is engaged in the
 " performance of such duties, a person summoned to
 " testify before it cannot raise the question of its competency to act. His duty is to testify as required,
 " leaving the question of legality to be tested in the modes
 " provided by law by those who may have an interest in
 " the question."

If a witness may not raise such questions of jurisdiction, it follows, *a fortiori*, that he may not raise questions of procedure like those raised by the appellant here.

We submit that the conclusion from I. and II. must be that a Grand Jury may without a specific charge proceed under the supervision of the Court or on the general suggestion of the District Attorney to conduct an inquisitorial proceeding to determine whether a suspected crime has been committed and if so by whom, subject at all times to the restraint of the Court where such power is being abused.

III.

NO INCONVENIENT OR UNJUST RESULTS CAN ATTEND THE ADOPTION OF THE RULE WE CONTEND FOR, AND SOUND PUBLIC POLICY DEMANDS THAT IT BE HELD THAT THE ACTION WAS PROPERLY SET IN MOTION IN THIS CASE.

A. It was contended below by the counsel for the appellant that to concede inquisitorial powers to a Grand Jury without in every case requiring a specific charge against a particular person would open up under the guise of the administration of justice possibilities of wrong and oppression "beyond conception."

Perhaps it is a sufficient answer to say that in the many jurisdictions referred to in our citations above, where inquisitorial powers much broader than those for which it is necessary for us here to contend, have been exercised by Grand Juries for many years, there has been no suggestion that they have been used as an engine of oppression. And it is quite clear that the system is surrounded with such safeguards that the danger of abuses is very remote.

In the first place the scope of the powers of a Grand Jury is limited by the jurisdiction of the Court of which it is an appendage (*United States vs. Hill*, 1 Brock., 156). It is also subject to the direction of the Court and cannot effectually exercise some of its most important functions without the interposition of the Court. It must resort to the Court to enforce by subpoena the attendance of witnesses, and it is only through the order of the Court that witnesses may be punished for contumacy (*Commonwealth vs. Bannon*, 97 Mass., 214; *Heard vs. Pierce*, 8 Cush., 338). The Court may inquire whether the Grand Jury has exceeded its powers (*People vs. Naughton*, 7 Abb. Pr. U. S., 421, 426; *Denning vs. The State*, 22 Ark., 131, 132), and may punish the entire jury or any of its members (*Turk vs. State*, 7 Ohio Pt. II., 240, 243; *State vs. Cowan*, 1 Head, 280; *re Ellis, Hemp.*, 10). Thus while the Grand Jury is an independent body, its independence is confined within well-defined limits. That this appellant is able to delay an investigation of an alleged violation of law affecting millions of citizens of this country is due to the fact that he could not be committed for

contempt until the *Court* had ordered him to answer the questions which the Grand Jury had asked him.

But it is said that this point should be considered from the standpoint of a person under investigation; and that his liberty should not be put in jeopardy upon a roving unlimited examination not limited by some specific charge. Why should he be heard to complain? From time immemorial it has been considered one of the most useful attributes of a Grand Jury that it could investigate in secret and withhold from the person charged the fact that he was being investigated. It is clear, therefore, that no abuse of power can arise from the fact that an inquisitorial investigation is kept secret from the accused. He is protected by his right to answer the indictment and it furnishes slight basis for complaint on his part that the Grand Jury could not or did not formulate the charge before they began to take testimony.

Assertion of possible abuses is made, but how they are to be reasonably apprehended is not clearly pointed out. If the District Attorney or the Grand Jury make improper use of their powers the Court may at any time stop an investigation which is going beyond safe or proper bounds by refusing to compel witnesses to testify or produce evidence. Indeed, practically, the Court may fix the limits within which a Grand Jury may proceed. But the tendency of modern grand juries and prosecuting attorneys would hardly lead a Court so to intervene; for the danger of abuse is too remote. Indeed, the *existence* of the controlling power of the Court makes impossible the recrudescence of the dread horrors of the Spanish Inquisition pictured so graphically by counsel below.

B. On the other hand, considerations of sound public policy demand that inquisitorial power *shall* be exercised by the Grand Jury, particularly in a matter of wide public interest. It has always been supposed that in a matter where from the nature of an offense a large portion of the public is either interested or involved the Grand Jury can investigate of their own motion—and, of course, they could do so on the suggestion of the prosecuting attorney without a specific charge. Riots and conspiracies are familiar examples where such jurisdiction has been exercised. This is no doubt a survival of the ancient practice of the early grand juries

which acted upon mere rumor and has no doubt been retained in modern practice, because in no other way could such offenses be properly investigated. Such cases have been loosely described as matters of "public notoriety," but no court has ever attempted to define that expression. With the immense increase of the population and the development and extension of industrial and governmental agencies, affecting as they do through the medium of the telegraph, railroad and the press not only a greater number of people, but also a greater portion of the entire people, it would be a very inadequate view for this Court to take that a matter of public notoriety was to be confined to some riot, strike or other public disturbance affecting the people of some particular locality. With the development of civilization the significance of mere legal terminology must bend to the force of changed conditions; and if it is necessary in order to effectually investigate the so-called Tobacco Trust to deal with its supposed violation of the Anti-Trust law as a matter of public notoriety, the Court should aid the Government in so doing. By legal or illegal means that trust has a practical monopoly of the tobacco trade. Each day that fact affects millions of people in this country. This must be manifest to every Grand Jury in the country. But there are the same difficulties in proving specific violation of law in such a case as in the case of a riot called to the attention of grand jurors by common talk. So many people are concerned and so many acts committed that unless somebody has power to proceed to investigate by compulsory process, a public offense which through its *results* may be perfectly manifest to all, will go unpunished because, on account of the multitude of acts and the number of offenders, definite charges against particular persons may not be framed until a large number of witnesses shall have been examined. It is not like a case of proving that A on a certain day committed a theft; proof of criminalizing facts necessarily involves an examination of a multitude of circumstances which assembled together may prove a violation of law.

Every consideration of maintaining order and enforcing laws passed for the general good demands that the violation of the Anti-Trust law by an immensely powerful corporation con-

ducting its business in every part of the country should for the purpose of giving a Grand Jury jurisdiction be regarded as a matter of public notoriety.

IV.

THE MATTER UNDER INVESTIGATION WAS SUFFICIENTLY COMMITTED TO THE GRAND JURY BY THE ORDER OF JUDGE LACOMBE.

If it be necessary the action of the Grand Jury may be sustained by treating the investigation as a matter committed to it by the Court. With the record before it, the Court directed the witness to answer the questions and produce the books and papers. This was tantamount to an approval of the investigation by the Court and was, in effect, giving the matter to the Grand Jury "in charge;" and so Judge WALLACE regarded the situation saying "that the action of the Court was equivalent to an express instruction to the Grand Jury to investigate the proceeding mentioned in the presentment" (fol. 53). And as we have said above this must *always* be the case before a witness may be compelled to answer.

V.

THE STATEMENT OF THE DISTRICT ATTORNEY TO THE GRAND JURY WAS A SUFFICIENT CHARGE AGAINST THE TWO CORPORATIONS NAMED.

What we have said makes it very clear also that if a charge be necessary against a particular person which is not to have the technical accuracy of a bill of indictment, the statement made by the District Attorney in this case that two specified corporations have been guilty of a violation of the provisions of the Anti-Trust law fills every reasonable requirement. *Counsel for the appellant has never been able to make a suggestion of a further or different charge or statement except one that had all the technical accuracy of a bill of indictment.*

VI.

WHETHER A CAUSE OR ACTION UNDER THE TITLE MENTIONED IN THE SUBPOENA WAS PENDING IS UNIMPORTANT. THE PROCEEDING MIGHT HAVE PROCEEDED WITHOUT A TITLE.

It is probably better practice to omit the title altogether on a subpoena to appear before the Grand Jury. It is not uncommon to entitle proceedings "In the Matter of John Doe," either because suspicion has not attached to any particular person or because the interests of justice require that the name of the accused be not disclosed.

In *United States vs. Reed*, 27 Federal Cases, 737, Judge NELSON said in relation to a proceeding before a Grand Jury:

" There is no cause pending in court, or even before
 " the grand jury, in the legal sense of the term, at the
 " time the witnesses are sworn, and, in consequence, no
 " title to the proceedings can properly be given, or be
 " necessary to the validity of the oath. If the person
 " to be accused before the grand jury is named, it is
 " simply for the purpose of giving application to the
 " oath, or to the evidence under it; and, as we have
 " seen, this application has been regarded as sufficiently
 " direct and explicit when the oath is administered generally, and as relating to all persons concerning whom
 " charges are to be made before that body."

* * * * *

" But, we do not regard the memorandum given to
 " the clerk, as already referred to, in this case or in any
 " other, even where the accused are all specially
 " named when the oath is administered, as a title, within
 " the technical meaning of that term, but, as used
 " simply for the purpose of giving application to the
 " oath and to the evidence to be given thereafter under
 " it."

If no title is necessary, it follows that the title which was used may be disregarded as surplusage.

In *The Appeal of Hartranft*, 85 Pa. St., 433, the Supreme Court of Pennsylvania in some respects takes a narrow view of

the function of the Grand Jury. It holds that it is necessary that a subpoena should be issued in the name of some person, and thus is at variance with the decision in *United States vs. Reed*. But under the Pennsylvania State practice, it is necessary for the Grand Jury to apply to the Court for the issuance of subpoenas, and this language of the Court is particularly significant: "No doubt the Court might have directed a subpoena to have issued for the Commonwealth in any case where the Commonwealth was a party or where it was apparent it was in some way interested in some case or transaction then depending." And again: "The Commonwealth may have this process in any proceeding where its interest is apparent, whether as a suitor or a prosecutor."

In the case at bar the United States was mentioned in the subpoena as the party presenting the charges against the corporation defendants. In the Hartranft case, however, the State was not a party or otherwise interested.

SECOND: As to the Fourth Amendment to the Constitution.

It is contended that the compulsory production of the papers mentioned in the subpoena *duces tecum* would constitute "an unreasonable search or seizure," and be in violation of the provisions of the Fourth Amendment.

That Amendment provides as follows:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized."

1. *The Amendment does not relate to the compulsory production of papers for use as evidence.*

A. There is not now and there never has been any procedure (except, perhaps, under the Rules in Equity) for the purpose of

securing evidence by compulsory writ where it is necessary to show probable cause or make any oath or describe any property or point out its locality. At the time when the independence of this country was declared, searches and seizures to obtain incriminating evidence had been only recently abandoned in England after the agitation by Wilkes aimed at the practice whereby the Secretary of State, an officer of the Crown, assumed to issue "general warrants" to search the premises of persons suspected of criminal libel, for the purpose of discovering evidence thereof (Lord CAMDEN in *Entinck vs. Carrington*, 19 State Trials, 1030). In this country (principally in Massachusetts) at about the same time occurred the agitation in opposition to the issuance by the Courts to Custom House officers of writs of assistance, which were like the ordinary warrant to search for stolen goods and which empowered revenue officers in their discretion to search suspected places for smuggled goods. These writs of assistance were no doubt prominently in the minds of the framers of the Fourth Amendment when they provided that warrants should be issued only upon probable cause (see *Paxton's case*, Quincy's Reports, 51, and Appendix, 395; *Cooley, Constitutional Limitations*, 6th Ed., 367), although it is, no doubt, also true that the Amendment "bears the impress of the controversy as to general warrants which agitated England during the Grenville ministry, and which, to the Colonists, had associated the claim of the British Executive to issue general warrants with the claim to arbitrarily tax the Colonies" (*Wharton's Commentaries*, Section 560; see, also, *Cooley, Constitutional Limitations*, 7th Ed., p. 426).

But it is quite clear from the historical origin of the Fourth Amendment that it was not intended to limit the power of the judiciary when it was proceeding in the ordinary way through the writ of subpœna *duces tecum* to compel the production upon a trial in Court of documentary evidence. That writ had existed from time immemorial in England—long before general executive warrants came into use. Without such a writ it would be "utterly impossible to carry on the administration of justice" (*Summers vs. Moseley*, 2 Cr. & M., 477; and see exhaustive note *Wertheim vs. Continental R. & T. Co.*, 15 Fed. Rep. 718, and Lord ELLENBOROUGH in *Amey vs. Long*, 9 East 473). But its purpose and effect is totally

different from a search warrant and other writs of that kind. For the witness retains possession of the documents described in the subpoena. His right of privacy is not invaded; he need show them neither to the counsel nor, at least if they are incriminating, to the Court; and they cannot be impounded unless a seizure is made after compliance with the provisions of the Fourth Amendment. Finally, the witness is left to determine largely for himself whether the documents would tend to incriminate him and, in spite of the compulsory production of the papers, he retains his rights under the Fifth Amendment unimpaired. The maxim *nemo tenetur se ipsum accusare* (or *prodere*) on which that Amendment was based was a rule of common law long before searches and seizures had been complained of as grievances and was an adequate protection against incrimination of a witness by evidence produced by himself, whether oral or documentary. But the Fourth Amendment aimed at a different abuse, viz.: the seizure of papers or other tangible property by officers of the law in such a manner that the owner was deprived not only of his possession and control of them, but also of his right when they were produced as evidence to assert his privilege in order to avoid their incriminating effect (*Adams vs. New York*, 192 U. S., 585).

Bearing in mind these considerations it is difficult to see how under any circumstances a compulsory production of papers under a subpoena *duces tecum* can be held to be an unreasonable search and seizure, particularly where the papers cannot be used to incriminate the witness; and we have been unable to discover any case where it has been held that it is. On the contrary, it has been finally settled by the decision of this Court in *Interstate Commerce Commission vs. Baird*, 194 U. S., 25, that evidence produced in response to a subpoena *duces tecum* by a witness who is furnished effective immunity from prosecution on account of the incriminating character of the evidence is not a search or seizure under the Amendment. In the *Baird* case a violation of the Interstate Commerce law was alleged, and it was sought to compel the production of certain contracts and vouchers tending to support the charge. Objection was made, based upon both the Fourth and the Fifth Amendments. The objection was disposed of, however, on the authority of *Brown vs. Walker*, Mr. Justice DAY

writing the opinion. Referring to Justice BRADLEY's opinion in the *Boyd* case (*infra*), Mr. Justice DAY said (page 45):

" In that opinion the learned Justice points out the
" analogy between the Fourth and Fifth Amendments
" and the object of both to protect a citizen from com-
" pulsory testimony against himself, which may result in
" his punishment or the forfeiture of his estate, or the
" seizure of his papers by force, or their compulsory
" production by process for the like purpose. * * *

" As we have seen, the statute protects the witness
" from such use of the testimony given as will result in
" his punishment for crime or the forfeiture of his
" estate. Testimony given under such circumstances
" presents scarcely a suggestion of an unreasonable
" search or seizure."

And Mr. Justice MILLER speaks with equal emphasis in the *Boyd* case (*infra*) as follows (page 641):

" I cannot conceive how a statute aptly framed to
" require the production of evidence in a suit by mere
" service of notice on the party, who has that evidence
" in his possession, can be held to authorize an unreason-
" able search or seizure, when no seizure is authorized or
" permitted by the statute."

In the case of *In re Moser*, 101 N. W. Reporter, 591, decided by the Supreme Court of Michigan, the difference between the office of a subpoena *duces tecum* and a search warrant was under consideration. The petitioner was convicted of contempt of court, for refusing to produce before the grand jury, the books and records of a corporation, in obedience to a subpoena *duces tecum*. The Court states that the refusal at the trial was not based on fear of self-incrimination, though that ground was urged on the appeal. The grand jury was engaged in investigating charges of corruption against municipal officers, in connection with a contract between the city and a corporation and the witness subpoenaed was the president of the corporation.

After reviewing the evidence, the Court says (p. 592) :

“ Does the production of these books under the order
 “ of the court amount to unjustifiable search and seizure
 “ prohibited by the Constitution? The learned counsel
 “ counsel for the petitioner state their position upon
 “ this point as follows: ‘ There is no difference in prin-
 “ ‘ ciple between the forcibly seizing and carrying away
 “ ‘ of such books by the sheriff or other court officer,
 “ ‘ and the compulsory production of them on a sub-
 “ ‘ poena *duces tecum*. If the officers of this company,
 “ ‘ whom the people are seeking to indict, have any
 “ ‘ rights in the information contained in those books,
 “ ‘ or in the books themselves, which would enable them
 “ ‘ to resist the sheriff if he sought to take the books
 “ ‘ away by force, then obedience to a subpoena *duces*
 “ ‘ *tecum* cannot be compelled unless the law will sanc-
 “ ‘ tion an attempt to do by indirection what it would
 “ ‘ be unlawful to do directly. * * * And therefore
 “ ‘ we contend that, even if there was nothing in these
 “ ‘ books which would involve Mr. Moser in a criminal
 “ ‘ charge, still he was right in his refusal to produce
 “ ‘ them if they contained evidence of the guilt of other
 “ ‘ officers and members of the corporation, persons who,
 “ ‘ if actually present, would have a right to take them
 “ ‘ and keep them for their own protection, as against all
 “ ‘ the powers of the prosecution.’ The difference be-
 “ ‘ tween seizing record books and documents of another
 “ ‘ upon a search warrant, and the production of the
 “ ‘ same upon a subpoena *duces tecum*, is apparent. In
 “ ‘ the former the owner is absolutely deprived of all
 “ ‘ possession and control thereof, and they and their
 “ ‘ contents are subjected to the gaze and examination of
 “ ‘ others. In the latter the records and documents are
 “ ‘ not taken from the possession of the owner. They
 “ ‘ are produced in court by him in his possession, and
 “ ‘ only such matters therein as pertain to the issue in-
 “ ‘ volved can be subject to the examination of the proper
 “ ‘ officers of the court. The production of books and
 “ ‘ papers for inspection and use in suits, both civil and
 “ ‘ criminal, is as old as the law itself. Whether the

" production is by search warrant or by a subpoena *duces tecum*, the necessity therefor must be shown to the court, and the particular documents or records required sufficiently specified in the application ; and, in either process, courts will permit only the examination of such parts thereof as relate to the issue before the court. The process for search and seizure is the only one usually resorted to to determine whether property stolen or unlawfully seized is in the possession of another. The usual process to secure evidence from records and documents is by subpoena *duces tecum*, and no case is cited where an attempt has been made to proceed by search warrant. No private individual can be compelled to produce his books or papers for the purpose of affording evidence against himself in a criminal prosecution.

In 1 *Greenleaf on Evidence* (16th Ed.), § 469a, the author takes a similar view, saying :

" But " (§ 469f) " the defendant's production of documents after the manner of a witness is a different thing from the official seizure and impounding of incriminating documents. In the latter case, the defendant is not called upon to testify by producing the books ; the situation is no different from the carrying away of a bundle of counterfeit bills or of stolen goods or of a murderer's weapon ; no doubt the accused is unwilling that these things should be taken, but he is not being called upon as a witness ; accordingly, the privilege is not violated, whether it is tools or clothing or documents that are taken."

If a subpoena *duces tecum* requiring a production of documents of an incriminating nature is contrary only to the prohibition of the Fifth Amendment, or if it violates the Fourth Amendment only because it compels him to produce incriminating evidence, in either case the appellant here is furnished immunity by the Act of February 25th, 1903, and on the authority of *Brown vs. Walker* and the *Baird* case is compellable to produce the evidence because this immunity removes any possible unreasonableness.

B. Some doubt has been thrown upon the proper scope of the Fourth Amendment by the language of Mr. Justice BRADLEY in the prevailing opinion in *Boyd vs. The United States*, 116 U. S., 616. It was sought by the Government to obtain certain books and papers in a suit to recover a penalty or forfeiture under a provision of the Revenue Law, which provided that on motion of the Government's Attorney the Court should have the power to require the defendant to produce in Court his private books, invoices and papers and that on failure to do so the allegations of the Government's Attorney should be taken as confessed. It was said by Justice BRADLEY that this was equivalent to a compulsory production of the papers to be used against the defendant or his property in a criminal prosecution, and that, in effect, it was an unreasonable search and seizure within the meaning of the Fourth Amendment; and he also held that it was in violation of the Fifth Amendment in that it compelled a person to be a witness against himself in a criminal case.

It is very plain, both from what is said by Mr. Justice BRADLEY of the historical origin of the Fourth Amendment and from the facts of the case to which the language of his opinion was applied, that his opinion rested principally upon the immunity which every person has, both under the common law and under the Constitution, from producing evidence which may tend to criminate him. It was not necessary for the decision of the case to hold more than this, and it was solely upon this ground that Mr. Justice MILLER and Chief Justice WAITE concurred in the judgment of the Court.

But Justice BRADLEY, in the course of his opinion, used the following words :

“ Breaking into a house and opening boxes and
 “ drawers are circumstances of aggravation; but any
 “ forcible and compulsory extortion of a man's own tes-
 “ timony or of his private papers to be used as evidence
 “ to convict him of crime or to forfeit his goods, is
 “ within the condemnation of that judgment. *In this*
 “ *regard the Fourth and Fifth Amendments run almost*
 “ *into each other* (p. 630). * * * We have already
 “ noticed the intimate relation between the two
 “ amendments. They throw great light on each other.

"For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms. * * * And we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit, is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment" (pp. 633, 634).

It is by no means clear what Justice BRADLEY means by saying that the Fourth and Fifth Amendments "run almost into each other" and that "they throw light on each other." Except in a limited sense, as we have already shown, the two Amendments had a different historical origin, and the protection of the Fifth Amendment is complete without resort to the Fourth Amendment; and it was complete under the facts in the *Boyd* case. The compulsory production of the papers in that case would have been a proper exercise of the court's power. But, for a failure to respond, the usual remedy would have been to commit the witness for contempt. Instead of such a provision, however, and without compelling him to attend in court to testify and produce the papers, the statute declared that the effect of his non-attendance should be deemed to be that he had incriminated himself. This is clearly an enforced self-incrimination and in violation of the Fifth Amendment. But why is it necessary to

resort to the Fourth Amendment? We see no good reason for it and that was the view of Justice MILLER and Chief Justice WAITE.

Mr. Justice MILLER, writing a concurring opinion, said (p. 639):

" I am quite satisfied that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. The order of the court under the statute is in effect a subpoena *duces tecum*, and, though the penalty for the witness's failure to appear in court with the incriminating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear. * * * But this being so, there is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers as evidence on the trial, authorizes an unreasonable search or seizure of the house, papers, or effects of that party."

And Mr. Wigmore in his recent treatise on Evidence (Section 2264) says of the Boyd case :

" The majority's opinion in *Boyd v. United States* therefore mistreats the Fourth Amendment, in applying its prohibition to a returnable writ of seizure describing specific documents in the possession of a specific person. But, apart from this error, the radical fallacy of the opinion lies in its attempt to wrest the Fourth Amendment to the aid of the Fifth. The 'intimate relation between them,' which the opinion predicates, must be wholly denied. In the first place, the two doctrines had had a totally different political and legal history. Furthermore, if the privilege against self-incrimination had been regarded as violated by seizures

“ of papers, it is singular that this principle did not
 “ suffice, without anything more, to defeat the practice
 “ of general warrants in Wilkes’ controversy. And
 “ again, if it had any such bearing, it would have pro-
 “ tected equally against all warrants, whether general or
 “ specific, lawful or unlawful. Nor can we suppose that
 “ the framers of the Constitutions and Bills of Rights,
 “ with Wilkes’ pamphlets and Otis’ speeches fresh in
 “ their memories, could have believed that they were
 “ merely duplicating one principle in the two clauses of
 “ the same document. In short, the principles of the
 “ Fourth and the Fifth Amendments are complementary
 “ to each other ; what the one covers, the other leaves
 “ untouched.”

We submit that it was only necessary in the *Boyd* case for the Court to decide that the effect of the statute under consideration was to compel the witness to produce evidence incriminating himself and was for that reason contrary to the Fifth Amendment. But even if the statute be regarded from the standpoint of the Fourth Amendment it will be observed that it did not compel the production of the papers, but it provided that if they were not produced they should be *conclusively deemed to be incriminatory*. If this was, in effect, a search under the Fourth Amendment it was unreasonable, because it compelled the witness to *confess the crime*—a very different thing from giving evidence which *might* incriminate.

Another effect of Justice BRADLEY’S language is not to be overlooked. He distinctly holds that the effect of what was done under the statute in question was an unlawful search and seizure which was not “ substantially different from compelling him to be a witness against himself.” This amounts to holding that evidence may be excluded because it has been obtained or discovered in an illegal manner, irrespective of the question whether it will incriminate the witness from whom it has been obtained. But before the decision in the *Boyd* case the rule had been uniformly held to be the other way, viz. : that the only question upon the production of documents in Court is whether they are admissible as evidence, (see *Wigmore on Evidence*, § 2183, and authorities cited in Note 1 on page 2956 ; also pp. 3126 and 3127 ; *Green-*

leaf on Evidence (supra), 16th Ed., § 254a) and this Court has so held since the *Boyd* case was decided in *Adams vs. New York*, 192 U. S., 585.

It seems plain from these considerations that Justice BRADLEY's remarks about the Fourth and Fifth Amendments "running into each other" were unnecessary to the case in hand and they are not an accurate interpretation of the Fourth Amendment in its application to facts like those in the case at bar. However far the Court may go in applying the general language of the prevailing opinion in the *Boyd* case to particular cases that may arise, it is quite clear that in the *Baird* case the Court has placed a distinct limitation upon its application by holding that the compulsory production of documents under a subpoena *duces tecum* by a witness who is granted immunity from incrimination by such documents presents no feature of a search or seizure.

In the *Baird* case subpoenas *duces tecum* were served upon a number of companies, parties to the proceeding requiring them to produce all contracts for the purchase and transportation of anthracite coal entered into by each of the companies respectively during a period of over two years with "any producers of" anthracite coal or owners or operators of anthracite coal "mines." In some cases companies not parties to the proceeding had made the contracts. Original vouchers were also demanded from the companies for the months of April and May, 1901, April and May, 1902, and January and February, 1903, showing transactions for the purchase and transportation of coal bought from five independent companies. The objection was set up in the several answers in the proceeding brought by the Interstate Commerce Commission that the demand of the subpoena *duces tecum* was in direct violation of the provisions of the Fourth Amendment of the Constitution and "in derogation of the rights of" the witness and "of the corporation of which he is an officer to have its private books and private affairs as a merchant protected from unreasonable search and seizure" (Record, pp. 117, 218, 228).

Yet the Court said that "testimony given under such circumstances presents scarcely a suggestion of an unreasonable search and seizure."

It will be observed that no weight was given to the fact

that the books and papers called for were the property of the corporations of which the witnesses were officers, even though the proceeding would in all probability have resulted in the incrimination of those corporations. But the Court held that the compulsory production of documents in the custody of an individual who was himself entitled to immunity from criminal prosecution was not an unreasonable search and seizure of the property either (1) of the witness himself, (2) of the corporation of which he was an officer, or (3) of third persons who were not parties to the proceeding. This decision is a conclusive authority in our favor upon this point.

2. *Unreasonableness under the Fourth Amendment cannot be predicated upon either the indefiniteness of the description of the books and papers called for in the subpoena or upon the volume of evidence and the inconvenience in producing it.*

The law applying to the obligations of witnesses requires only such certainty as is practicable in describing papers required to be produced under a subpoena *duces tecum*. This, however, is a rule of practice and varies according to circumstances and the character of the papers asked for; it has never been supposed to have any relation to the rights of persons under the Fourth Amendment. It is simply a rule of convenience for the witness so that he may be furnished with all practicable means of identifying the papers asked for. The demand of a greater number of papers than is reasonable is matter for the consideration of the Court below. If the power of the Court is used oppressively that is an error to be corrected in the usual way. But that the Court is governed by the restrictions of the Fourth Amendment in determining whether the demand of a subpoena is too indefinite, or too sweeping, or too oppressive in some other way, has never been supposed. An intimation *obiter in ex parte Brown* is the only expression of any Court to that effect that we have found; and it is contrary to the general trend of the authorities.

In *United States vs. Babcock*, 3 Dillon, 537, it was contended that subpoena *duces tecum* did not sufficiently identify certain telegraphic messages and therefore required the com-

pany to make a search for them. But Judge DILLON said that this objection was made without a proper view " of the functions of the writ."

He continued :

" It is very easy, if Mr. Orton or the Company is
 " not in possession of the papers, for them to come here
 " and say ' we have no such papers.' That excuses
 " them to the Court, if the Court is satisfied that such
 " is the fact. But some degree of certainty is undoubt-
 " edly required in undertaking to specify the papers
 " and we have looked through books which have been re-
 " ferred to by counsel and others and we find the law in
 " practice quite well settled. It is this : The papers
 " are required to be stated or specified only with that
 " degree of certainty which is practicable considering
 " all the circumstances of the case, so that the witness
 " may be able to know what is wanted of him, and to
 " have the papers on the trial so that they can be used
 " if the Court shall then determine that they are com-
 " petent and relevant evidence. There is no specific
 " statute of the United States upon the subject. The
 " Fifteenth section of the Judiciary Act refers alone to
 " civil cases at common law."

The Court, also, says that the fact that the writ compels Mr. Orton to make search for the messages is not important.

In re Storrer, 63 Fed. Rep., 564, there was a general investigation by the Grand Jury into a strike. A subpoena was issued for the production of telegrams. The Court ordered their production and distinguishes a subpoena issued in a civil case and a subpoena issued in a grand jury case, saying,

" There is no question but that in many particulars
 " they are very similar. But the state court, in com-
 " menting upon the former subpoena, said that it ' was
 " an evident search after testimony ; ' that is to say,
 " that it called for an indiscriminate search among the
 " papers in the possession of the witness,—for no
 " particular paper, but for some possible message, or
 " communication that might throw some light on some

" issue involved in the trial of a civil case. This is a
 " very different affair from an examination before a
 " grand jury, involving an original inquiry into the con-
 " duct of parties with respect to criminal acts, where
 " the telegraphic messages were probably the effective
 " means of carrying out their unlawful purposes. The
 " subpoena now under consideration calls for the pro-
 " duction of telegrams, describing them with such par-
 " ticularity as appears to be practicable ; and, under all
 " the circumstances, I think they are sufficiently de-
 " scribed, to indicate, to an ordinarily intelligent person,
 " the particular communications required."

See also

Wigmore on Evidence, § 2193.

United States vs. Tilden, 10 Ben., 566, 578.

In re Mitchell, 12 Abb. Pr., 249.

Counsel below referred to a note in Cooley on Constitutional Limitations, in which that author expressed the opinion that a process compelling the production of a man's private correspondence or seizing it in the mails was an unreasonable seizure under the Constitution, and closing with the words—" but no American officer or body possesses such authority and " its usurpation should not be tolerated." This only expresses the view of the author and is contrary to the general trend of authorities. It was expressly disapproved in *In re Storrer*, *supra*, where the Court said: " But the courts have cer-
 " tainly not adopted this view of the law and legislation has
 " not been in that direction."

The *Baird* case itself is an authority for us on this point, for there the subpoenas were of an unusually searching character. We do not stop to make an analysis of the subpoena in that case to compare it with the subpoena in the case at bar. The record does not disclose in either case how many papers the subpoena would, if obeyed, have produced. But whether in the *Baird* case the original vouchers which evidenced the transactions with five independent companies for six months and the contracts for purchase and transportation of coal during a period of over two years with producers and owners and operators of mines, involved a greater or less scrutiny of the affairs of the companies than was involved in

the demands of the *Hale* subpoena, certainly the difference was only one of degree and cannot affect the principle by which the legality of such a process of the Court must be determined.

The general purpose of the subpoena herein was evident. It was to get information as to agreements: and after the hearing of May 2d, the petitioner was fully aware of the purpose of the examination and the kind of papers required. Moreover, he knew enough about the matter to object on the ground that the evidence called for would tend to criminate him under the Anti-Trust Law. If his objection was based on his inability to identify the papers, he should so have stated. Such an objection could, perhaps, have been obviated by further description; or the witness could have examined in order to discover what papers were needed. These are matters of mere practice in the court below (*United States vs. Tilen*, 10 Ben., 566, 579; *Chaplin vs. Briscoe*, 13 Miss., 198).

3. *The petitioner was bound to produce the documents called for by the subpoena. Whatever his excuse, his failure to do so constitutes contempt.*

It was not for the witness to determine whether the description of the papers was sufficiently definite or the papers themselves material to the inquiry, or whether the production of such a volume of papers was oppressive. He was bound to comply, so far as it was possible, with the terms of the writ and produce the papers for the inspection of the Grand Jury and of the Court, submitting as he might be advised any objection to their use in evidence. (See note by John D. Lawson, 15 Fed. Rep., 723, where the subject is fully considered. See, also, *Doe vs. Kelly*, 4 Dowl., 273; *Key vs. Russell*, 7 Dowl., 693; *Amey vs. Long*, 9 East, 433; *Holtz vs. Schmidt*, 2 Jones & Sp., 28; *Bull vs. Loveland*, 10 Pick., 9; *Chaplain vs. Briscoe*, 5 Sm. & M., 198; *Corsen vs. Dubois*, 1 Holt, 239; *Field vs. Beaumont*, 1 Swanst., 209; *Mitchell's Case*, 12 Abb. Pr., 249; *Doe vs. Clifford*, 2 C. & K., 448; *In re O'Toole*, 1 Tuck., 39). See also *Wigmore on Evidence*, Section 2200, at page 2979.

Upon the presentation of any excuse by the witness the Court would have made an appropriate order. If the witness

had objected that the subpoena was too indefinite in its description of the papers or too oppressive in the number required to be produced, the Court, as it did in *United States vs. Hunter*, 15 Fed. Rep., 712, could have quashed the subpoena with leave to the District Attorney to amend the process or could have made any other reasonable provision.

But the witness defied the writ and the order of the Court and, therefore, is in contempt.

4. *Certain reasons of public policy which should influence the Court to adopt the broadest possible rule of evidence in cases involving violation of the Anti-Trust Law.*

The remark of the Court in *Brown vs. Walker* that unless evidence of this kind can be elicited from witnesses, it will be impossible to enforce recent laws relating to Interstate Commerce applies to documentary evidence with even greater force than it does to oral testimony. Numerous decisions like the Addyston Pipe case, the Traffic cases, the Northern Securities case, the Beef Trust case and the Tile Trust case have denounced specific formal agreements as violations of Section I. of the Anti-Trust Law. It would not be strange if Trusts, seeking to evade the law, should, in view of these decisions, adopt a method other than that of making formal agreements. It is a matter of notoriety that this result is accomplished by some corporations through "statistical departments" out of which grow implied agreements; by instructions to agents given simultaneously by a number of corporations amounting to an agreement to maintain a price fixed; by so-called "gentlemen's agreements;" by agreements, the only evidence of which is a course of dealing or memoranda or correspondence, or perhaps, by other methods devised to evade a law which some believe to be based upon unwise economic theory.

The only evidence which is easily obtainable is that which relates to the *results* of illegal contracts or methods. The direct proof of the contracts themselves is generally in the possession of the officers of the corporations and the policy of the immunity legislation is to compel them to disclose it.

It may easily be seen that the pursuit of evidence of a violation of law is not a simple matter. The exact line of in-

quiry cannot be pointed out in advance. The exact documentary evidence which may be required cannot be specified. Indeed, an illegal contract or combination may only be proved by the production of hundreds, or even thousands, of letters and documents. To say that the Court will require a Grand Jury to limit the scope of its investigation or exactly specify each agreement or paper which it seeks to examine would be to paralyze the investigation.

The materiality of the testimony is the important thing. That cannot be determined until the evidence has been produced; and so far as the record before the Court shows, the documentary evidence called for in this case was very material to the investigation before the Grand Jury.

THIRD. As to the Fifth Amendment of the Constitution.

We suppose it will not be seriously contended that if the Immunity Act of February 25th, 1903, is applicable to a proceeding before a Grand Jury, it is broad enough to give absolute immunity from future prosecution on account of anything concerning which the appellant might have testified or produced evidence. That the act of February 25, 1903, is applicable to a proceeding before a grand jury, we shall show in another place; and, thus, the prohibition of the Fifth Amendment against compelling a person to be a witness against himself in a criminal case becomes inapplicable. Even if the appellant was justified in refusing to produce the books and papers called for, he should have answered the questions which were asked him. His refusal, as we point out above, after the Court directed him to do so was contempt of court, and, therefore, the order appealed from should be affirmed.

Two reasons, however, were urged below why the witness was not compellable to answer the questions, namely, (1) that as the act of February 25, 1903, does not specifically require a witness to testify to incriminating matters, "it should not be construed as imposing such requirement, but merely as intending to reward his voluntary admissions of wrongdoing with a grant of immunity when made in aid of matters in

which the Government is especially interested," and (2) that he was entitled to assert the privilege under the Fourth and Fifth Amendments in behalf of MacAndrews and Forbes Company, as he was an officer of that corporation.

The second of these reasons we deal with in our Brief on the appeal in the case of *McAlister vs. Henkel* to be argued at same time with this appeal. As to the first reason we submit the following considerations :

Every person subject to the jurisdiction of a competent and lawful tribunal is bound to give testimony. This is a "solemn and important duty that every citizen owes to his country" (*Ward vs. State, supra*). He is privileged to decline only in case his answers may tend to criminate him. Our system of jurisprudence does not permit a witness to refuse to answer because he prefers not to or even because his answer will tend to degrade him, except, only, where degrading testimony is interposed solely to affect his credibility (1 Greenl. on Ev. Secs. 454, 455). Where the reason of the privilege ceases the privilege also ceases (Broom's Legal Maxims, p. 654). This is illustrated in several cases mentioned by Mr. Justice BROWN in *Brown vs. Walker*, as where the liability of the witness to penalty or forfeiture has been barred by the Statute of Limitations, or where he elects to waive his privilege or where he has received a pardon (161 U. S., 597-599). The witness is compellable to answer because "he stands with respect to "such offence as if it had never been committed." Quoting with approval the rule laid down in the Counselman case, Mr. Justice BROWN said, "that, if the statute does afford such immunity against future prosecution, the witness will be compellable to answer."

In *Warner vs. State*, 81 Tenn., 52, a statute of Tennessee exempting witnesses from prosecution for offenses against the election laws was construed as merely offering a reward to a witness for waiving his constitutional privilege and not as compelling him to answer. But in *Brown vs Walker* the Supreme Court disapproved such a view of the statute, saying (p. 604) :

"But, for the reasons already given, we think that
"the witness cannot properly be said to give evidence
"against himself, unless such evidence may in some

"proceeding be used against him, or unless he may be
 "subjected to a prosecution for transaction concerning
 "which he testifies."

It is evident from the opinion of the Court that if they had been of the opinion that immunity was furnished under Section 860 of the Revised Statutes, the omission from that section of an express compulsion of testimony would not have been regarded as important.

Judge BUFFINGTON said, in deciding *Brown vs. Walker* below (70 Fed. Rep., 49) :

"The act of testifying has, so far as he is concerned, wiped out the crime. It has excepted him from the operation of the law, and, as to him, that which in others is a crime has been expunged from the statute books. If, then, there exists, as to him, no crime, there can be no self-crimination in any testimony he gives, and if there can be no self-crimination, if neither conviction, judgment, nor sentence can directly or indirectly result from his testimony, what need has he for the constitutional provision?"

The primary purpose of the immunity act was to enable the Government to secure evidence which had not theretofore been available in order the more effectually to enforce the Anti-Trust Law. To construe that law as merely offering a reward to guilty officers of corporations if they chose to avail of it would effectually defeat the purpose of the law, for no officer would ever elect to testify.

FOURTH. The protection of the Fourth and Fifth Amendments is based alone upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer.

For a discussion of this point we respectfully refer the Court to the First Point in the brief in *McAlister vs. Henkel*.

FIFTH. The proceeding before the Grand Jury was a "proceeding, suit or prosecution" within the meaning of the immunity provision contained in the legislative, executive and judicial appropriation act approved February 25th, 1903.

The Act of February 25th, 1903 (32 Stats., 903), provides as follows :

" That for the enforcement of the provisions of the
 " Act entitled ' An Act to regulate commerce,' approved
 " February fourth, eighteen hundred and eighty-seven,
 " and all Acts amendatory thereof or supplemental
 " thereto, and of the Act entitled ' An Act to protect
 " trade and commerce against unlawful restraints and
 " monopolies,' approved July second, eighteen hundred
 " and ninety, and all Acts amendatory thereof or sup-
 " plemental thereto, and sections seventy-three, seventy-
 " four, seventy-five and seventy-six of the Act entitled
 " ' An Act to reduce taxation, to provide revenue for
 " the Government, and other purposes,' approved August
 " twenty-seventh, eighteen hundred and ninety-four, the
 " sum of five hundred thousand dollars, to be immedi-
 " ately available, is hereby appropriated, out of any
 " money in the Treasury not heretofore appropriated,
 " to be expended under the direction of the Attorney-
 " General in the employment of special counsel and
 " agents of the Department of Justice to conduct pro-
 " ceedings, suits and prosecutions under said Acts in
 " the courts of the United States ; *Provided*, That no
 " person shall be prosecuted or be subjected to any pen-
 " alty or forfeiture for or on account of any transaction,
 " matter, or thing concerning which he may testify or
 " produce evidence, documentary or otherwise, in any
 " proceeding, suit, or prosecution under said Acts : *Pro-*
 " *vided further*, That no person so testifying shall be
 " exempt from prosecution or punishment for perjury
 " committed in so testifying."

Counsel for the petitioner contends (1) that a proceeding before a Grand Jury is not such a "proceeding, suit or prosecution" under the Anti-Trust Act as is contemplated by the Act of February 25th, 1903, and (2) that it does not sufficiently appear from the record that the proceedings were taken under that Act so that in case of a future prosecution of the appellant he could plead or prove the proceedings before the Grand Jury in order to secure immunity.

This point is not well taken, for the following reasons :

1. Sections 1 and 2 of the Anti-Trust Law, under which the appellant was informed that the investigation was proceeding, provide that any person violating their provisions "shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding Five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the Court." The statute thus creates a criminal offense. If it is not, within the meaning of the Fifth Amendment of the Constitution, an "infamous crime," at least it is a crime for the commission of which a person can be prosecuted only upon the indictment of the Grand Jury and trial by a petit jury ; and such proceedings must have been within the contemplation of Congress when it prescribed the penalties above-mentioned for a violation of the Act. How, in any sense of the word, they are to be excluded from what is meant by the terms "proceeding" or "prosecution" under the Act of February 25th, 1903, it is difficult to see.

In the first place, neither "proceeding" nor "prosecution" is an inapt word to describe what takes place before a Grand Jury when it is examining witnesses and procuring evidence upon the investigation of facts to determine whether they point to the commission of a crime. Certainly a proceeding is a popular term for such an investigation and it is equally apt as a technical term. Counsel will have difficulty in selecting any word which will more accurately denote the thing which a Grand Jury does. And "prosecution" is not an inaccurate word for the same thing, even though in codes of procedure a more restricted meaning may be given it.

In *United States vs. Reed*, and in the *Counselman* case, both cited above, use is made of the word "proceedings" to describe proceedings before the Grand Jury.

In *United States vs. Moore*, 11 Fed. Rep., 248, an indictment was found for a violation of the Act of July 13th, 1866, which provided for a stamp tax and imposed "certain fines, penalties and forfeitures" to be "sued for and recovered, where not otherwise provided, in the name of the United States, in any proper form of action, or by any appropriate form of proceedings, before any circuit or district court of the United States for the district within which said fine, penalty, or forfeiture may have been incurred."

An indictment was found under this provision of the statute and the defendant contended that that form of proceeding was not justified by the statute. The Court overruled this objection and held that an indictment was "an appropriate mode of proceeding and quite as appropriate as an action of debt." It was contended that the words "may be sued for" limited the action to a civil suit. The Court overruled this objection and held that a suit might mean a criminal prosecution, citing in support of this Webster, Bouvier and, also, Bacon (Vol. 3 Abr., p. 542), where it is said that "an indictment is defined as an accusation at the suit of the King," and "that it is a prosecution at the suit of the King merely," and is "the King's suit."

The Court adds :

"The words 'sued for and recovered,' in the statute, mean the same as 'prosecuted for and recovered;'
 "and, taken in connection with the expressions 'any form of action,' 'or by any appropriate proceedings,' cannot be held to exclude a suit or prosecution by indictment, as the proceeding must be in the name of the United States."

The decision in the *Moore* case was followed by Judge BARR *United States vs. Craft*, 43 Fed. Rep., 374.

In *Hogan vs. State*, 30 Wisconsin, 428, it was held that where a Police Justice was given certain powers "in civil and criminal proceedings," this extended to the "drawings of a Grand Jury."

See, also,

Bruner vs. Superior Court, 92 Cal., 248.

Matter of Tillery, 43 Kansas, 192.

In *Yates vs. The Queen*, 14 Queen's Bench Division, page 648, it is said that the word "'proceeding' * * * is a "very different term and one much *wider* than criminal prosecution." It was there held that a proceedings by information for libel was a criminal proceeding, but that "that does "not make it a criminal prosecution."

In *Drumm vs. Cessnum*, 61 Kan., 467, it was held that a warrant of arrest issued against a person charged with a criminal offense is a "proceeding" within the meaning of a statute of Kansas.

In view of these decisions it would seem that there was little substance in the contention now so elaborately urged.

Counsel below referred to a restricted meaning given to the phrase "criminal proceedings" in *Post vs. U. S.*, 161 U. S., 583. But this Court in that case had under consideration the question of jurisdiction of the Court below under an Act "regulating the procedure in *criminal causes*" in which it was provided that "all criminal proceedings instituted for the *trial* of offenses" should be tried in a certain district. The statute obviously referred to trials of criminal proceedings *after* indictment, and the Court so found. But it attempted to give no general definition to the word "proceeding" and the case has no bearing upon the interpretation of the act of 1903.

Furthermore, the intent of the Indemnity Act becomes clearer when some recent decisions of this Court are considered.

Before the decision in the *Counselman* case (142 U. S., 547), it was supposed that Section 860 of the Revised Statutes of the United States was adequate to furnish immunity to witnesses called to testify in proceedings under the Commerce Acts. It was presumably with the *Counselman* decision in mind that Congress passed the Act of February 25, 1903, in order to remove the disability of the Government pointed out by the Court in that case, so that an effective method for enforcing the law might be furnished. Without the immunity to witnesses, the Court had said in the *Counselman* case, "the enforcement of the Interstate Commerce law or other "analogous acts, wherein it is for the interest of both parties to "conceal their misdoings, *would become impossible*, since it is "only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained."

Can there be any doubt that Congress was attempting, by appropriating money, to enable the Attorney General to procure the enforcement of all the laws relating to interstate commerce? This was admitted by counsel for *Hale* below; and of similar acts in *Brown vs. Walker* the Court said "the act is "supposed to have been passed in view of the opinion of this "Court in *Counselman vs. Hitchcock*"; and again in the *Baird* case, "We cannot read these statutes without perceiving the "manifest purpose of Congress to facilitate the disposition "of cases brought under the direction of the Attorney-General to enforce the provisions of the Anti-Trust and "Interstate Commerce Statutes." Will not this Court again say that it is indispensable to a successful enforcement of such laws that witnesses may be compelled to testify? But it would be very inadequate if such compulsion were not to exist in such an important proceeding as that before a Grand Jury. To hold that the words "proceeding" and "prosecution" would include a criminal prosecution *after* indictment found and not include a proceeding before a Grand Jury *leading* to an indictment would clearly defeat the obvious purpose of the legislation.

2. It sufficiently appears from the record that the proceedings of the Grand Jury were under the Anti-Trust Law. The witness was fully advised by the attorney for the Government, in the presence of the Grand Jury (fols. 22, 37), "that the proceeding then pending before the said Grand "Jury was a proceeding under the so-called 'Sherman Act,' "being 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 26 Statutes, 209, First Supplement, U. S. Revised Statutes, 726, *et seq.*, and the Acts "amendatory thereof and supplementary thereto, and particularly Chapter 755 of the Laws of 1903, approved February "25th, 1903; and he was then and there further advised that "under the last-named Act no person shall be prosecuted, or "subjected to any penalty or forfeiture for or on account "of, any transaction, matter or thing concerning which he "may testify, or produce evidence, in any proceeding, suit or "prosecution under the said Act—that is to say, under the "Sherman Act—under which the aforesaid proceeding was "brought; provided, however, that no person so testifying

"shall be exempted from prosecution or punishment for perjury committed in so testifying."

This statement was made in the presence of the Grand Jury. It must be assumed that it was made with the acquiescence of that body, if, indeed, the Assistant District Attorney is not for that purpose the representative of the Grand Jury. Surely the witness himself cannot complain that he was not advised as to what the Grand Jury supposed to be the nature of the proceeding; and if the question ever arose upon a criminal prosecution of the witness on account of his testimony the fact that the proceeding was under the Anti-Trust Law would be provable and indisputable.

SIXTH. The order of the court compelling the witness to answer is not a violation of the Tenth Amendment of the Constitution. It does not encroach upon the power of the States "to prosecute and punish offenders against their own peace and dignity," and "to grant and withhold pardons and to provide for and deal with the granting or withholding thereof, in accordance with their own Constitutions and laws."

The Tenth Amendment provides as follows :

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

While this point was not expressly decided in *Brown vs. Walker*, its decision was necessarily involved. The immunity of the statute under consideration in that case was not materially different from that contained in the Act of February 25, 1903. It was contended by the plaintiff in error in that case that he did not secure immunity from prosecution in a State Court on account of any answer which he might make. But the Court held that while he would not be entitled in a State Court to exemption under the Fifth Amendment, as that was intended only as a restriction on Federal power, the

act of Congress was not subject to the same limitation but was under the Sixth Article of the Constitution "the supreme Law of the land" (*Stewart vs. Kahn*, 11 Wall., 493, and some other cases are cited). And with reference to the immunity clause under consideration, the Court said (p. 608), "that the immunity is general, and to be applicable whenever and in whatever Court such prosecution may be had" (see, also, *Jack vs. State of Kansas*, decided at this term of the Court).

Neither in the Interstate Commerce Law under consideration in *Brown vs. Walker*, nor in the Anti-Trust Law involved in the case at bar, was Congress dealing, as an independent matter, with a rule of evidence intended to be of general application. In both cases Congress was acting under Article I., Section VII., Clause 3 of the Constitution expressly reserving to it the power "to regulate commerce * * * among the several states * * *." And it was entirely competent for it to prescribe rules of evidence if it deemed them necessary to the effective exercise of its unquestioned power. And that it was necessary was the opinion of the Supreme Court, for in the opinion in *Brown vs. Walker* it is said, "If, as was justly observed in the opinion of the Court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce Law or other analogous acts, wherein it is for the interest of both parties to conceal their misdoings, would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained."

These exemption clauses cannot, therefore, reasonably be regarded in any other light than as incidental to the exercise of a power expressly reserved to the general government, and as such must be sustained as constitutional (Art. 1, § 8, Ch. 18, of the Constitution). It hardly seems necessary to cite authority upon such a plain proposition, but the following cases may be referred to :

Hepburn vs. Griswold, 6 Wall., 603.

Legal Tender Cases, 12 Wall., 457.

In re Jackson, 14 Blatchf., 251.

Prigg vs. State of Pennsylvania, 16 Pet., 618.

McCulloch vs. State of Maryland, 4 Wheat., 316.

See, also, 2 *Story on Constitution*, §§ 1245, 1247,

1248, 1250, 1252-1254.

It is significant that these points were not urged upon the Court in *Brown vs. Walker*. Mr. Carter in the latter case did not even suggest them. The points would apply with equal strength to any *effective* exemption clause, and if sustained would render the enforcement of all such laws as the Interstate Commerce Law and the Anti-Trust Law practically impossible.

SEVENTH. The exemption contained in the Act of February 25, 1903, was not in effect an attempt to exercise the pardoning power, or a violation of Article II., Section II., Cl. 1, of the Constitution.

That clause provides as follows :

" The President * * * shall have power to grant
 " reprieves and pardons for offenses against the United
 " States, except in cases of impeachment."

The precise point now raised by the petitioner was urged in *Brown vs. Walker* and decided adversely to his contention (161 U. S., p. 601).

While it has been held that Congress has no power to limit the pardoning power of the President in any way (*Ex parte Garland*, 4 Wall., 380; *U. S. vs. Klein*, 13 Wall., 128, 141), it has never been held that Congress may not itself in legislation of the kind under consideration here conditionally exempt persons from the penal provisions of its own enactments. As Mr. Justice Brown pointed out in *Brown vs. Walker*, a law with such an exemption from its penalties extended to persons mentioned therein belongs to a class of legislation common in England and usually dealt with by Parliament, especially in cases where a large number of implicated witnesses are needed (see *Taylor on Evidence*, Sec. 1455 and note) as in parliamentary inquiries or in prosecutions for gaming, riot, conspiracy, violation of the election laws or other such offenses. Such legislation is familiar in this country in the case of bribery and gambling. There is no decision in this country that such exercise of the legislative power is excluded

by the provision of the Constitution conferring upon the President the pardoning power.

The power of the President is generally exercised with reference to acts already committed. In every case where amnesty or pardon has been exercised by act of the legislature it has been in relation to future acts. While the acts passed after the War of the Rebellion in some cases purported to deal with cases where violations of law had been theretofore committed, it is doubtful whether they constituted more than "a suggestion of pardon * * * rather than "authority" and "an expression of the legislative disposition to carry into effect the clemency of the Executive," as such acts were characterized in *United States vs. Klein*, 13 Wall., 139, 141. In that case it was also held that amnesty extended by proclamation of the President pursuant to such "suggestion" or "expression" was not affected by the repeal of the act of Congress purporting to authorize it.

Where legislative acts of amnesty or pardon have related to past offenses, they have either dealt with cases of attainder where it was necessary that Parliament should act, or been cases where the legislature has sought to investigate or render effective the performance of the legislative function. If, for instance, to render the execution of an act effective, it was necessary, as in this case, to establish new rules of evidence, the legislature did so. And in most cases such as we have referred to above the legislature has endeavored to make the operation of penal statutes effective by withholding the penalty of the statute from those offenders who were willing to aid in the execution of the law. In a correct view this is not the pardoning power at all.

The point now urged has arisen very infrequently, although Congress has very often passed laws granting remission of fines and exemption from penalties. This is no doubt due to the well recognized limitations upon the exclusiveness of the Executive power. As early as 1825 in *United States vs. Morris*, 10 Wheat., 246, the principle was not denied by the party challenging an act of Congress. In *The Laura*, *supra*, decided in 1884, it was said that "the Court and the eminent counsel who appeared in that case accepted it as a proposition not open to discussion." And it was not until Mr. Carter raised the point in *Brown vs. Walker* that the Court

was again called upon to consider it and disposed of it somewhat summarily.

Another view of the matter is worth consideration.

If a pardon from the President be necessary in addition to the act of Congress, it was in effect granted when the President signed the Act of February 25, 1903. No particular form of pardon is necessary. In *U. S. vs. Klein, supra*, the act of Congress purporting to authorize the President to grant amnesty and pardon to certain persons was referred to as an "expression of the legislative disposition to carry into effect the clemency of the Executive," although it was also held that the power of the President to exercise the pardoning power after the act of Congress was repealed was not affected. So here the act of the President in giving his approval to the act in question was an expression of the Executive approval of the act of clemency sought to be put into effect by Congress. If he had not approved of it, presumably he would have vetoed it.

EIGHTH. Even if the Court should find that the appellant was not bound to produce the papers asked for in the subpoena duces tecum, he is in contempt for his refusal to answer the oral questions.

At the hearing before the Grand Jury the witness was first asked a number of questions. Afterwards he was asked to produce the papers mentioned in the *subpœna duces tecum*. He declined both to answer the questions and to produce the papers. He is clearly in contempt for not answering the oral questions.

FINALLY. The order of June 10th, 1905, should be affirmed.

WILLIAM H. MOODY,
Attorney General.

HENRY W. TAFT,
FELIX H. LEVY,
Special Assistants to the At-
torney General.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWIN F. HALE, APPELLANT,	}	No. 340.
<i>v.</i>		
WILLIAM HENKEL, UNITED STATES MARSHAL		
in and for the Southern District of New York.		

BRIEF FOR THE UNITED STATES IN REPLY TO THE BRIEF OF THE APPELLANT.

FIRST.

The answer to the proposition of appellant's counsel that the subpoena *duces tecum* was defective in that no action was pending and that therefore there was no case or controversy within the meaning of article 3 of the Constitution is involved in the first point of our Brief in which it is contended that the grand jury provided for in the fifth amendment of the Constitution has power (1) to conduct an inquisitorial proceeding and (2) to proceed without a specific charge against a particular person.

Assuming that the court will have no difficulty in saying that any proceeding in which such powers were exercised was, within the meaning of article 3 of the Constitution, a *case or controversy*, and there-

fore within the judicial power of the United States, it can not be supposed that by using the words "case" and "controversy" it was intended to *limit* the powers of the grand jury then existing.

SECOND.

A. The general adoption by grand juries in this country of inquisitorial methods seems to be admitted by counsel for the appellant (Appellant's Brief, p. 21). The well known experience of some of the counsel as prosecuting officers gives weight to their testimony.

B. It is said on page 30 of the brief for the appellant that the soundness of the proposition, that "there must at least be pending before them (the grand jury) some specific charge directed against a particular person or persons," was assumed by this court in *Counselman v. Hitchcock*. We do not so understand the opinion of the court in that case. In the part of the opinion quoted by counsel it is said:

"It is contended by the appellant that the grand jury of the District Court was not in the exercise of its proper and legitimate authority in prosecuting the investigation specifically set out in its two reports to the District Court; that those reports could not be made the foundation of any judicial action by the court; that the Interstate Commerce Commission was specially invested by the statute with the authority to investigate violations of the act and charged with that duty; and that no duty in that respect was imposed upon the grand jury until specific charges had been made. But in the view we take

of this case we do not find it necessary to intimate any opinion as to that question *in any of its branches.*"

We understand this language to mean that the court did not express any opinion as to whether there was, in the absence of specific charges, any authority in the grand jury to act.

C. Lloyd v. Carpenter (Appellant's Brief, p. 33) admits the powers of the grand jury for which we contend, but holds that in Pennsylvania the court places strict limitations upon these powers. That these limitations were narrower than those existing at common law is indicated from the view of the court, that the grand jury acts as "the umpire between the accuser and the accused, instead of assuming the office of the former." This statement of the court is without foundation, for the grand jury was always regarded as an accusing body. Justice Field (2 Sawy., 668) in his well-known charge said of the grand jury that "However this may have been in its origin, it was, at the time of the settlement of this country, an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial." (See also *17 Am. & Eng. Enc. of Law*, 2d Ed., p. 1266, 1279, and *State v. Branch*, 68 N. C., 186.) It is quite true that the Executive Department through the medium of the Department of Justice has participated in grand jury proceedings and aided in presenting for the consideration of that body facts bearing upon the question

as to whether crime has been committed. But this function is performed merely as an aid to the grand jury in the discharge of the duties which have always been conceded to it as an independent body. To say that the Department of Justice or any other Executive Department of the Government appears to present its case before the grand jury as an umpire and that the grand jury can take no initiative and has abdicated its ancient powers and prerogatives has no foundation beyond the assertion of the counsel for the appellant. Essentially the same procedure now prevails as formerly, varied only, as we have pointed out in our main brief, by the change of conditions under the American form of government. While it is true in a limited sense that the functions of the grand jury are judicial, that is not so in the sense that there is a controversy between parties and a judgment of the court adjudicating upon it. The function of a grand jury is not inaptly defined by the ancient word "inquest," which is still applied to its proceedings. The grand jury inquires; it generally considers only incriminatory evidence. Except as evidence in defense may be incident to or involved in accusing evidence, a grand jury generally has no right to seek for or receive evidence in defense. (*Respublica v. Shaffer*, 1 Dallas, 236; *U. S. v. Lawrence*, 4 Cranch, C. C., 514; *Wharton's Cr. Pr. & Pl.* (8th ed.), sec. 360.) Only accusing witnesses, that is, witnesses who have knowledge of facts tending to show that the person under investigation has been guilty of a crime, are called before

the grand jury, and it is upon such evidence that that body is called upon to decide whether there are "probable grounds" that anybody has been guilty of any particular crime. Of course, the jury reach a conclusion or a judgment, but it is an *accusing* judgment, and can be executed only by calling upon the accused person to put in a defense. While in a limited sense this involves a judicial function, the proceeding is *sui generis*, and there is no analogy in the criminal or civil law which may be resorted to for aid in defining its limits.

It is not correct to say that it must be ascertained that a crime has been committed before the grand jury may proceed to inquire. Perhaps that is usually the case where a simple crime such as theft has been committed; but where a crime involving a more complicated examination of facts and law is concerned it is absurd to say that there must be positive information that a crime has been committed before a grand jury may inquire. It has been and it must be that a grand jury is authorized to proceed whenever matters come to their attention from which there arises a greater or less *probability* that there has been a violation of the law. It is aside from the question to compare the inquisitorial method of the star chamber with that before a grand jury. It is true that the star chamber prosecutions were instituted upon suggestion and suspicion and the *ex officio* oath was administered and inquisitorial proceedings conducted, and that from these practices great abuses arose. But while the agitation against the star cham-

ber was going on proceedings before the grand jury continued, and in the very act cited (p. 35) by counsel for the appellant (25 Edward III) an indictment or presentment by a grand jury is contrasted with the proceedings before the star chamber, to show that the former is compatible with the principles of civil liberty. It appeared from this act that it was not inquisitorial proceedings as such that were objected to, but the manner in which the court had conducted them, it being the wish of the people to have such proceedings confined to the body which from time to time came from the neighborhood and held office only until they had finished the work in hand.

The discussion of the powers of a grand jury is not advanced by repeating that such powers are judicial and by considering the nature of judicial powers as exercised by other governmental or judicial bodies, for we thus find ourselves dealing with a question of mere terminology. For instance, it is not useful to compare such a body as was attempted to be created in the statute which was under consideration in the *Matter of Pacific Railway Commission v. Stanford* (32 Fed. Rep., 241), because the functions of that body were radically different from those of a grand jury. The question here, however, is: What is the institution which has been known for centuries as the grand jury, and what have been and what are its powers?

In considering this question counsel for the appellant quite candidly states what is the only conclusion to which their view can logically bring them, viz, that

"there can be no exercise of judicial power unless there be *parties* to the proceeding, a *matter in controversy*, an *assertion* on the one hand and a *denial* on the other, and, in short, a distinct *issue* to be *determined*" (p. 35). In short, in order to sustain their contention they would revolutionize the whole grand jury system by giving an accused person the right to be represented before the grand jury, by restricting procedure before that body by pleadings and all the rules of procedure incident thereto, and by having an investigation before a grand jury proceed with all the formality, regularity, and technicality incident to a prosecution upon an indictment. (See *Respublica v. Shaffer, supra*, on this subject. This, of course, would involve the formulation in the form of a charge of anything brought to the attention of the grand jury by the district attorney or by the charge of the court and would necessarily abolish all secrecy in its proceedings. Whatever may be said in behalf of the wisdom of such a radical change in our system of criminal jurisprudence, it needs no more than a reference to our main brief to show that it is a change which, so far as our research has disclosed, has never before been suggested by anybody, except the counsel for the appellant in this case.

THIRD.

As to whether a grand jury proceeding is included within the words "proceeding, suit, or prosecution" used in the immunity act of 1903.

A. It is quite true that in *Brown v. Walker* neither the court nor the counsel made any question as to whether "proceeding," as used in that statute, extended to an investigation before a grand jury; that it did was too obvious. If a doubt had existed about it, it would not have escaped the diligence of the able counsel who presented that case to the court and the attention which the vigorous opinions of dissenting justices show that they gave to the points involved. Counsel suggests that there is some significance in the fact that Congress did not in the act of 1903 use the words which were used in the act of 1893, under consideration in *Brown v. Walker*. But this seems to be straining at an argument, when the words which were used in the act of 1903 were clearly sufficient in themselves to include a grand jury proceeding. The omission of the provision that no person should be excused from testifying is commented on; but that provision, as we have shown in our main brief, was wholly unnecessary to compel the witness to testify. While the entire clause was put in a different form, the words in the act of 1903 were equally as apt to describe a proceeding before the grand jury as those in the act of 1893.

An argument is advanced that a concession was made by Congress to the views of the four dissenting

justices in *Brown v. Walker*, and particularly to their suggestion of the difficulties that a witness may have in procuring evidence as to what he had previously testified to. But there is absolutely no foundation for making any such argument as that. If any presumption is to be indulged, it is that Congress assumed that the view expressed by the majority of the court was the law, and that no such difficulties as were suggested by Mr. Justice Shiras were real or substantial. Furthermore, these difficulties are much exaggerated by counsel. It is not, as they assert, only on rare occasions that a stenographer is present before the grand jury. As a matter of fact, he is, as he was in the present case, there and taking the minutes of the jury. Furthermore, the testimony of the witness himself would be sufficient to sustain his position that he had been compelled to testify and was immune; and it is extremely unlikely that in the short time before the statute of limitations should have barred a prosecution for any offense, evidence as to what the witness had testified to would have disappeared or become difficult to produce. In the present case it sufficiently appeared by the statement of the assistant district attorney, which, of course, could not be disputed, what the proceeding was; indeed, the statement was so broad that the witness would have immunity from prosecution for any charge under the antitrust law.

The statement of counsel as to the intention of Congress is wholly without any foundation in the policy which has resulted in antitrust and interstate commerce legislation. The whole tendency of that

legislation has been to make it more and more thorough and drastic. There have been obvious and repeated efforts to make immunity legislation effective. There is no evidence in any of the circumstances or in the public discussion of measures to indicate that the assumed difficulties of a witness before the grand jury had any weight with Congress; and if they had, it is equally absurd to suppose that Congress would not have declared such intention in language which would not require such arguments as are now advanced to make it plain.

B. In the brief for the appellant it is said (p. 49) that "the matters which constitute violations of the interstate commerce law could scarcely be the subject of State regulation and the chance of a State prosecution for other causes arising out of disclosures before Federal grand juries so remote as to be negligible." As a matter of fact, a number of States have passed laws prohibiting excessive freight-rate charges and unjust discriminations, granting damages to persons injured, and imposing criminal penalties.

(See Kansas General Statutes, 1901 edition, sec. 5980-5994; Statutes of Iowa, 1897, secs. 2123, 2132; Minnesota Statutes, vol. 2, pp. 83, 87, and sec. 771; Wisconsin Annotated Statutes, Sanborn & Berryman, p. 1079; Nebraska—see *Smyth v. Ames*, 169 U. S., 466; Pennsylvania—see *Logan v. Pennsylvania R. R. Co.* and statute involved in that case approved June 4, 1883; New York Railroad Law, sec. 38; Colorado, Laws of 1885, chap. 309. See also the following cases: *Alcott v. Supervisors*, 16 Wallace, 694; *Railroad v. Richmond*,

19 Wallace, 594; *Handley v. K. C. S. R. Co.*, 187 U. S., 617; *Minneapolis & St. L. v. Minnesota*, 186 U. S., 257.)

C. Counsel for the appellant attempts to refer the word "proceeding" to the preceding portion of the act where "proceedings in equity" and "proceedings" for seizure and condemnation of property are referred to. But these terms are used in a most general way and, from the technical standpoint, inaccurately; for it would be more appropriate to speak of an injunction suit as a "suit in equity" than a "proceeding in equity" and of a "proceeding" for seizure and condemnation as a "suit or action" for that purpose, and the use of the word "suit" in connection with an action at law is inartificial. All of these expressions are obviously used in a general and not a strictly technical sense. No safe argument, therefore, can be based upon the use of the same words in the subsequent part of the statute even if the argument of counsel for the appellant were otherwise sound.

D. The words "proceeding, suit, or prosecution," in the immunity act of February 25, were not used with reference to the antitrust law alone; they were used also with reference (1) to the interstate commerce law, approved February 4, 1887, and (2) to the revenue law, approved August 27, 1894; and they must, therefore, be construed as applying to "proceedings, suits and prosecutions" under those acts as well.

Under the interstate commerce law, as supplemented by the Elkins Act (approved February 19, 1903), certain violations of law are declared to be misdemeanors. Sections 3, 8, and 9 prohibit certain acts and provide

for proceedings in relation thereto. Section 12 provides for certain proceedings before the Commission, and authorizes that body, through the Attorney-General, to prosecute "all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof." The original immunity provision is inserted in this section. It was supplemented by the act of February 11, 1893, which was construed in *Brown v. Walker*, and which extended the immunity to testimony given "*in any cause or proceeding, criminal or otherwise*, based upon or growing out of any violation of the interstate commerce law." Section 13 provides for the consideration of any complaint made to the Commission and for the investigation by the Commission and a report. Provision is made for a jury trial.

The revenue act of August 27, 1894, more commonly known as the "Wilson bill," makes provisions similar to those in the antitrust law.

It will thus be seen, therefore, from the three acts referred to in the immunity act of February 25, 1903, that the words "proceeding, suit, or prosecution" used therein referred to a great variety of proceedings, and particularly under the interstate-commerce law, including (1) those before the Commission, (2) those before the circuit court on the application of the Commission, (3) jury trials, (4) suits in equity, (5) forfeiture proceedings, and (6) all those steps necessary to enforce the criminal penalties of the law.

To attempt to construe these words by special reference to proceedings under one of the three acts to

which they were applied is, obviously, an improper and inadequate way of attempting to get at their real significance. The further the examination goes the more clearly it appears that the words were intended to be comprehensive and to include every proceeding, whether criminal or civil, which might be availed of, in order effectually to enforce the remedies provided for by any one of the three acts. In this sense they clearly include a proceeding before the grand jury, which is a part of the usual and proper way of enforcing the criminal penalties of the acts.

E. It is only necessary to reply to the comments of counsel on the subject of the "utility" argument, as they call it, to say that the cases under the antitrust law, and the interstate commerce law, to which they refer, were all based upon specific agreements, easily proven. And, moreover, in those cases and in most of the cases decided before the commerce acts and the anti-trust acts had been fully interpreted and the purpose of the Government to enforce them plainly understood, the refusal by corporations to disclose facts had not become a common thing. Where the agreements have been in writing, and proven without opposition on the part of the corporations, the questions which are now being discussed have not proven to have practical importance. But after a number of constitutional objections to anti-trust legislation have been disposed of by this court, corporations are devising novel reasons why their private affairs should not be subjected to the scrutiny of the courts. When it was thought that the provisions of law could

be avoided on other grounds, there was a large number of cases where corporations freely disclosed their private affairs to the scrutiny of the Government; but when they had been deprived of defenses upon these grounds, obstacles to the enforcement of the law by withholding evidence are being interposed with the greatest ingenuity.

Whatever may be the constitutional rights of the American Tobacco Company and its affiliated companies, it ill becomes it, while it withholds all information as to its operations, involving the management of hundreds of millions of capital and probably affecting the interests of more than half of the population of the country, to advance an argument that this court should not go as far as it constitutionally may, and that the Department of Justice should not avail itself of all the remedies provided by the act, and in such order as it sees fit to adopt, in order to enable the Government to accomplish an effective enforcement of the laws against monopolies and unlawful combinations. Its counsel argue that the chief remedial features of the Sherman Act are proceedings in equity and for the seizure and condemnation of property; and while they admit that a criminal remedy is provided, they say that "there is no occasion for any such prosecution where no *overt act* has been committed." But will it be a difficult matter for any great corporation doing an interstate business, *if it seeks to avoid the law*, to obscure its acts with millions of secret details in such a manner that their real import may be dis-

covered only after a long inquisitorial investigation? Counsel *recommend* that the Government shall proceed by suit in equity, and if, incidentally, some fact is disclosed which makes it appear that a crime has been committed, that specific charges shall be made and submitted to the grand jury, which shall proceed, with all the novel restrictions now devised by counsel, to attempt with all the witnesses successfully pleading their privilege, the impossible task of finding an indictment.

We respectfully submit that this court should not limit itself in determining the questions involved in this case by any such nice suggestions as to the way in which the Government shall perform the duty which is devolved upon it to discover and punish violators of the law. This court should approach this question, not with a view of extending the protections of the Constitution beyond the limits fixed by their well defined historical origin, but rather to interpret the Constitution in such a way that a great public policy, approved by the people of the country, may be enforced, however powerful may be the opposition of the few who are opposed by self-interest to the enforcement of the law.

FOURTH.

As to the Fourth Amendment.

A. We have already pointed out in our main brief that in the case of *Wilkes* there was no semblance of a judicial proceeding. On the contrary, without authority of law the executive department of the Government seized and took into their possession docu-

mentary evidence. That was a trespass upon the rights of Wilkes and was the basis of Lord Camden's decision. The *motive* for the act was, of course, the obtaining of incriminating evidence; but the *illegal act* was committed before any proceeding was instituted either in any court or before any grand jury. As is said in the extract from May's Constitutional History of England quoted in the appellant's brief, ministers did not wait "to inquire after the accustomed forms of law." Furthermore, the decision is based to some extent (and it would have been a sufficient ground alone) upon the principle that, as the illegal method by which documentary evidence is obtained could not be interposed as an objection to its introduction in evidence (*Adams v. New York*), the seizure of the papers by the executive was in effect compelling a person to produce evidence against himself.

B. The fourth amendment legalizes certain searches and seizures; and, as we have just pointed out, the fact that there has been an illegal seizure may not be urged as a reason for the exclusion of evidence which is produced upon a trial. And so, whether the seizure is legal or illegal, the fifth amendment can not be availed of to keep out of evidence the thing seized. To this extent, then, the two amendments do not "run into each other." Furthermore, often, if not generally, a search or seizure is for the very purpose of obtaining incriminating evidence; and objection based on this ground only is not ground for withholding a warrant of search or seizure.

In other words, then, the fourth amendment does not help out the fifth amendment merely because a search or seizure was unreasonable, nor does the fifth amendment help out the fourth amendment by permitting the search or seizure to be declared unreasonable on the ground of incrimination. Despite the expression of this court in the *Adams* case that it had "no wish to detract from" the authority of the *Boyd* case, the effect of its decision was inevitably to limit the scope of Justice Bradley's language.

A fact existing in the *Boyd* case should not be overlooked, namely, that the statute under consideration in that case, in addition to practically compelling a witness to confess a crime, as we have pointed out at page 65 of our main brief, *permitted the attorney for the Government to inspect the papers mentioned in a notice which he was authorized to serve.* This inspection is not permitted when papers are produced in the ordinary way under a subpoena *duces tecum*, and therefore the two cases are for that reason to be differentiated.

C. There is a significant omission in the brief of the appellant of any specific argument based upon either the indefiniteness of description or the volume of papers described in the subpoena *duces tecum*. Counsel has dealt with that feature of the case as being unimportant. On page 73 of the brief it is said that the "extraordinary nature" of the subpoena "must be taken into consideration"; yet no definite deduction is made from this fact. It seems to us that the appellant's counsel are driven into this position by the logic of the

situation; for, as we shall point out below, if their contention be sound there will be an unreasonable search or seizure under the circumstances of this case, even though an officer of the corporation be compelled by the subpoena to produce only a single definitely described document.

D. *Ex parte Brown*, cited on page 76 of appellant's brief, expressly disapproves Judge Dillon's well considered opinion in the *Babcock* case (72 Mo., 96).

E. We are left in some doubt by appellant's brief as to whether counsel contend that the fifth amendment may be asserted in behalf of a corporation by an officer who is a witness, irrespective of the protection of the fourth amendment, as, for instance, when he is asked to answer orally a question which may tend to incriminate the corporation. On pages 74, 77, and 79 of the brief this position seems to be asserted, and yet on page 82 there seems to be a concession that the cases cited fairly sustain the "general proposition that the privilege under the fifth amendment is personal to the witness." As the point was specifically made only in the *McAlister* assignments of error we argued it fully in the brief in that case and, we submit, have satisfactorily disposed of any contention that the privilege may be asserted in behalf of a corporation. It is only necessary in reply to add a few observations in connection with the authorities cited in the appellant's brief.

The quotation from *Professor Wigmore's* book on evidence, cited on page 77 of the brief, is misleading,

because it is taken out of the context. The full quotation appears upon page 16 of our brief in the *McAlister* case and does not at all sustain the appellant's proposition.

In *Logan v. Pennsylvania Railroad* the decision was of the court of first instance. The Supreme Court dismissed the appeal. The decision is not a high authority, nor are the reasons elaborately considered.

The *Davies* case, cited on the same page of the brief, is not important. It was decided under a section of the Code of Civil Procedure of the State of New York, based upon the old rule in chancery, that in a bill of discovery a party to a suit is not compellable to disclose any facts which would subject him to a forfeiture or penalty. This appears from the case of *Phoenix v. Dupuy*, 2 Abb. N. C., 146, cited in the *Davies* case. This rule is designed for the protection of parties and, of course, a corporation which is a party to an equity suit comes clearly within its scope and intent.

F. Whether the contention of the counsel (Brief, p. 79) that the decisions of this court that a corporation is a person within the meaning of the fourteenth amendment necessarily leads to the conclusion that within the word "people," used in the fourth amendment, corporations are included, it is not important to inquire. Whatever may be the exact scope of that word, our argument in relation to searches and seizures is not based upon any contention that the fourth amendment may not be availed of in a proper case for the benefit of a corporation. Our contention under this amendment is

that it is not intended to apply to a case of an enforced production of documents under a *subpoena duces tecum*. Whether those papers belong to an individual or to a corporation. But upon the question whether in the fifth amendment the word "person" includes corporations, the decisions under the fourteenth amendment which relate to contract and property rights, have no bearing. To any argument of the appellant's counsel that a privilege against incrimination under the fifth amendment may be availed of by a corporation, we take issue. But we do not base our argument, as stated by appellant's counsel (brief, p. 80), that the protection of the fourth amendment is the personal privilege of the witness. We do, however, say that in withholding from a corporation the privilege under the fifth amendment against incrimination, it resulted that a corporation could not assert the privilege either in respect of oral testimony or of documentary evidence. The privilege against incrimination was available at common law in the case of either kind of evidence, and if an officer has in his custody a letter to the corporation which may tend to incriminate it, he may not refuse to produce it. That only results, however, from the omission of the framers of our Constitution to enlarge the privilege against incriminating evidence in such a way as to include within its scope corporations as well as persons.

Some Federal legislation in relation to interstate commerce is significant in connection with this discussion. In section 3 of an act entitled "An act to

regulate commerce with foreign nations and among the States" (Elkins Act), passed February 19, 1903 (32 Stat. L., 848), it is provided that the courts shall have power to compel the attendance of witnesses and to compel the production of all books and papers, and that "the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or *such corporation producing its books and papers*, but no *person* shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which *he* may testify or produce evidence, documentary or otherwise, in such proceedings." It is very significant that although immunity is furnished to persons on account of testimony given or documentary evidence produced, no such immunity is furnished to a corporation in the case of incriminating evidence it may be compelled to produce. If the contention of counsel were conceded this act would be unconstitutional because (1) it compels a corporation to produce evidence against itself without furnishing immunity and, therefore, is in violation of the fifth amendment, and (2) because the production of documentary evidence by the corporation, whether or not it would incriminate it, would be an unlawful search or seizure. We do not think that the court will so hold, but will rather consider the act above referred to as being an affirmation of the policy of our law that a corporation is not entitled to immunity against incriminating evidence, and that the compul-

sory production of testimony which may incriminate it is not an unlawful search or seizure under the fourth amendment of the Constitution.

If the argument in behalf of the appellant is sound, a witness may be compelled to testify orally to facts which may incriminate a corporation of which he is an officer, because he may not assert the privilege of the fifth amendment in its behalf and may not *under that amendment* object to the production of a letter in his custody belonging to the corporation, yet he may refuse to produce that letter because its production would constitute a search or seizure under the fourth amendment, not because the letter is incriminating, but solely upon the ground that the compulsory production of the letter would be an invasion of the right of privacy and a trespass upon the rights of the corporation. We have taken the instance of a single letter because the argument of counsel does not seem to depend upon the volume of the evidence sought to be obtained or the indefiniteness of the description or the character of the proceeding in which the demand is made. If any such rule as this were adopted by the court, it would apply both to proceedings before a grand jury and to criminal prosecutions and civil causes. It would involve in every case where a single piece of documentary evidence was required to be produced in the ordinary every-day practice in the courts that before a subpoena *duces tecum* or other process of the court were issued, that proof should be furnished that there was "probable cause" (whatever that might mean in an ordinary case), a particular description of the place where it

was thought that the paper was located, and a particular description of the paper itself. Such a result is really a *reductio ad absurdum*. It is impossible that the universal practice has proceeded for so many years and that we are only now discovering the real meaning of a search and seizure.

G. As we have pointed out in our main brief, the case of *Rex v. Purnell* was really decided upon the ground that while the books were the nominal property of a corporation, the disclosures contained in them were virtually those of the person against whom it was sought to introduce them in evidence. That is the view of Professor Wigmore (*Wigmore on Evidence*, sec. 2259); and that it is correct appears clearly from the report of the opinion of the court in 1 W. Blackstone, page 45.

HENRY W. TAFT,

FELIX H. LEVY,

Special Assistants to the Attorney-General.

WILLIAM H. MOODY,

Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

WILLIAM H. MCALISTER,
Appellant,

AGAINST

WILLIAM HENKEL, United States
Marshal in and for the Southern
District of New York.

No. 341.

BRIEF FOR THE UNITED STATES.

This is an appeal from a final order of the Circuit Court of the United States, for the Southern District of New York, made herein on the 14th day of June, 1905, denying the application of the appellant for a writ of *habeas corpus* (fol. 65).

On the 14th day of June, 1905, the Grand Jury of the Circuit Court of the United States, for the Southern District of New York, presented to the Hon. E. HENRY LACOMBE, Circuit Judge, written charges of contempt against the appellant herein for his refusal on that day to answer certain questions and produce certain documentary evidence, material to a certain complaint or charge then under investigation by the said Grand Jury. The presentment set out the service of a subpoena *duces tecum* upon the appellant, requiring him to attend before the Grand Jury,

"in a certain suit or proceeding now pending undetermined in the Circuit Court of the United States, for the Southern District of New York, before the Grand Jury thereof, between the United States of America, as complainant, and The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, defendants, on the part of the United States," and to produce three agreements, specifically described in the said subpoena as follows (fol. 21) :

" (1) An Agreement, bearing date September 27th, 1902, between Ogden's, Limited, of the first part ;
 " The American Tobacco Company, of the second part ;
 " Continental Tobacco Company, of the third part ;
 " American Cigar Company, of the fourth part ; Consolidated Tobacco Company, of the fifth part ; British Tobacco Company, Limited, of the sixth part ; and
 " The Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the seventh part ; a copy, or a duplicate original, of the said agreement being on file or recorded in the companies' registration office, in London, England.

" (2) An agreement providing for the transfer to a separate company of the export business from the United Kingdom (except to the United States) not only of Ogden's, Limited, but also of The Imperial Tobacco Company (of Great Britain and Ireland), Limited, and of Salmon & Gluckstein, Limited, and the export business from the United States of The American Tobacco Company, the Continental Tobacco Company and the American Cigar Company (except to the United Kingdom), which agreement is referred to in the said last-mentioned agreement of September 27th, 1902, as having been then already prepared and executed contemporaneously therewith.

" (3) An agreement dated September 27th, 1902, between The Imperial Tobacco Company (of Great Britain and Ireland), Limited, of the first part ; Ogden's, Limited, of the second part ; The American Tobacco Company, of the third part ; Continental

" Tobacco Company, of the fourth part ; American
 " Cigar Company, of the fifth part ; Consolidated To-
 " bacco Company, of the sixth part ; and Williamson
 " Whitehead Fuller and James Luskup, of the seventh
 " part."

The presentment further set out the appearance of the witness before the Grand Jury and his refusal either to testify or to produce the documentary evidence called for (fols. 13-19). A copy of the minutes of the proceedings of the Grand Jury at the session at which the appellant attended, was attached to the charges (fols. 23-28). It appeared from the presentment that the appellant was the secretary and a director of The American Tobacco Company (fol. 25).

The charges of June 14th were presented by the Grand Jury in open court, in the presence of the witness, who was attended by counsel.

The Court forthwith made the following order (fol. 55) :

" The witness is hereby directed to answer the ques-
 " tions as propounded by the grand jury, and forthwith
 " to produce, before the grand jury, the papers and
 " documents called for in the subpoena.

" The grand jury may now withdraw, and the wit-
 " ness will attend before it forthwith."

The Grand Jury, through the Assistant District Attorney, then resumed the examination of the appellant, who again refused to answer the questions or produce the documents (fols. 55 *et seq.*). Upon these facts being presented to the Court by a further communication from the Grand Jury (fols. 50 *et seq.*), the witness was adjudged by the Court to be in contempt, and was committed to the custody of the Marshal, until he should comply with the order of the Court (fol. 12).

Upon a petition setting forth the above facts, the appellant applied to the Court for a writ of *habeas corpus* (fols. 1 *et seq.*). This application was denied, upon the ground that it appeared from the petition itself that the petitioner was not entitled to the writ (fol. 59). No opinion was rendered by the Court.

All of the above proceedings took place on June 14th, 1905.

At the first session on June 14th the witness, upon being sworn, said :

" Before being sworn, I respectfully ask to be advised what the 'suit or proceeding' is, which is thus described in the subpoena under which I have been summoned before this body, the nature or purpose of this 'suit or proceeding,' and the specific charge against the defendants, if any has been made, in order that I may learn whether or not the grand jury has any lawful right or authority to examine me as a witness; and I also ask that I be furnished with a copy of the complaint, information or proposed bill of indictment, if any, upon which the grand jury acted, in order that I may know concerning what transactions, matters, or things I am called upon to testify or produce evidence " (fol. 23).

To this request the Assistant District Attorney responded as follows :

" Mr. McAlister, this is a suit or proceeding now pending before the grand jury, upon a complaint and charge made, in behalf of the United States of America, against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, under the so-called 'Sherman act,' being 'An act to protect trade and commerce against unlawful restraints and monopolies.' Under chapter 755 of the Laws of the United States of 1903, approved February 25th, 1903, no person may be prosecuted, or subjected to any penalty or forfeiture, for or on account of any transaction, matter, or thing, concerning which he may testify, or produce evidence, in any proceeding, suit or prosecution under the said 'Sherman act,' under which this suit or proceeding is brought; provided, however, that no person so testifying shall be exempted from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose of the United States Government not to prose-

" cute you, or subject you to any penalty or forfeiture,
 " on account of anything that you may testify to, or on
 " account of any evidence, documentary or otherwise,
 " which you may produce in this proceeding, and that I
 " offer you, and assure you, immunity and exemption
 " for any such evidence, either documentary or other-
 " wise, that you may give " (fol. 24).

Preliminary questions were then propounded to the witness and he declined to answer them, on the following grounds :

" FIRST, that there is no legal warrant or authority
 " for my examination ; second, that my answers may
 " tend to criminate me ; and, third, that my answers
 " may tend to furnish evidence against The American
 " Tobacco Company, of which I am secretary, and which
 " is one of the defendants against which this investi-
 " gation is directed, and that the Government, in this
 " manner, is attempting to compel The American
 " Tobacco Company to be a witness against itself in a
 " criminal case " (fol. 25).

The witness was then asked whether he had produced the papers called for in the subpoena *duces tecum* and he responded as follows :

" I have not, because, as I am advised by counsel, I
 " am under no legal obligation to do so ; second, be-
 " cause they may tend to criminate me ; and, third,
 " because they are not my property, but that of The
 " American Tobacco Company ; and are in my custody
 " solely by reason of my official relations toward that
 " company. Under these circumstances, my counsel ad-
 " vise me that the compulsion of the subpoena would, if
 " effective, amount to an unreasonable search for, and
 " seizure of, the company's papers and effects, in viola-
 " tion of its rights under the constitution, which it is my
 " duty to protect by all lawful means, as I am now doing.
 " I am further advised by my counsel that the subpoena
 " which is, in effect, a warrant to search for, and seize,
 " the papers in question, was not issued upon probable

" cause, or supported by oath or affirmation, and is, for
 " that reason, utterly null and void " (fol. 26).

Questions were asked concerning the relations between The American Tobacco Company and The Imperial Tobacco Company, all of which the witness declined to answer. He was also asked certain questions for the purpose of proving the execution and delivery of one of the agreements described in the subpoena *duces tecum* and he declined to answer. The agreement was exhibited to the witness and thus made a part of the record of the proceedings of the Grand Jury. It is Exhibit C, appearing at folio 29 of the record. A reference to the salient points of this agreement will be sufficient to show its materiality in an investigation of the character foreshadowed in the statement of the Assistant District Attorney.

The agreement is dated September 27th, 1902, and the parties are Ogden's, Limited, an English corporation, The American Tobacco Company, Continental Tobacco Company, American Cigar Company, Consolidated Tobacco Company, all American corporations, and British Tobacco Company and The Imperial Tobacco Company, British corporations. The agreement recites the control by The American Tobacco Company of the Ogden Company and of the British Company and the proposition to amalgamate those companies with the Imperial Company. An agreement follows for the sale of the property of the Ogden Company, including the control of the British Company, to the Imperial Company, upon certain terms not necessary to refer to here. Suffice it to say that it resulted in the absorption by The Imperial Tobacco Company of all of the interests of the British Companies. The agreement then provides that neither the American Companies, nor the British Companies which are controlled by The American Tobacco Company, shall thereafter engage, either directly or indirectly, except as mentioned below, in the business of a tobacco manufacturer, or in any dealing in tobacco or its products in the United Kingdom of Great Britain. The Imperial Company likewise agrees that it will not engage in the tobacco business or manufacturing in the United States, except with the consent of the American Companies, and except, further, that it shall be at liberty to " buy and treat tobacco leaf, and other materials in the United

"States, for the purpose of its business, and to engage
 "as subsequently provided in the agreement, in such
 "business as shall be carried on through or in connection
 "with " The American Tobacco Company, the Continental
 Company, the Cigar Company, or the Consolidated Company.

By reference to another agreement which is described as
 already prepared, special provision is made regarding the
 export business from the United States of the American
 Companies, and from the United Kingdom of the English
 Companies. This was one of the agreements called for in
 the subpoena *duces tecum*. The American Companies agree
 (fol. 41) not to "sell or consign any tobacco products to any
 person, firm or company within the United Kingdom, except
 the Imperial Company, or any person or companies designated
 by it." The English Companies similarly agree not to "sell
 "or consign any tobacco products to any person, firm or
 "company within the United States, except the American
 "Company, or persons or companies designated by it." And
 all the parties further agree that "None of the parties shall
 "sell any tobacco products to any person, firm or company
 "whom they have reason to believe will export the same to
 "the territory in which the seller has agreed not to sell such
 "goods as herein provided." Provision is also made for the
 sale by the American Companies to the Imperial Company
 and by the Imperial Company to the American Company of
 tobacco at a fixed price, which is stated in the agreement
 to be based upon cost of manufacture and a commission, and
 for the manufacture by the American Companies of brands of
 the Imperial Company and by the Imperial Company of brands
 of the American Companies.

The American Companies agree to procure the appoint-
 ment of the Imperial Company as sole agent in the United
 Kingdom for the sale of Havana and Porto Rico cigars and
 cigarettes, directly or indirectly controlled by the American
 Companies, upon the condition that the prices charged by the
 Imperial Company shall be as low as the prices charged by
 the American Companies "subject only to the exception that
 "if, at any time, the prices of cigars or cigarettes sold to any
 "country not affecting British trade, shall be temporarily re-
 "duced, *for the purposes of competition*, such local and tem-
 "porary reduction is not to be taken into account for the

"purpose of fixing the price of cigars and cigarettes sold to the Imperial Company." The Imperial Company agrees to sell no other cigars than those concerning which the agency is created, and it is agreed that, if the Imperial Company sells 72% of the total annual importations into the United Kingdom, the American Company shall not be entitled "to call in question the efforts and endeavors of the Imperial Company hereinbefore required" (fol. 44). This agreement is stated, however, to be "based upon the belief and assumption that" The American Tobacco Company, the Continental Tobacco Company, the American Cigar Company and the Consolidated Tobacco Company "*control, or will shortly control, not less than 80% of the aforesaid annual importations.*"

Other provisions of the agreement will become material upon an inquiry whether it is in violation of the Anti-Trust Law, but the foregoing is sufficient to show to the Court that the agreement would have been at least a material and competent item of evidence before the Grand Jury in the present case.

The petition for the writ of *habeas corpus* set out the grounds on which it was claimed that the detention of the petitioner was unlawful (fol. 1 *et seq.*). These grounds are also set out with more elaboration in the assignment of errors. In the main, they are the same grounds that were urged by the appellant in the case of *Hale vs. Henkel*, which is to be argued at the same time as the appeal in this case. Without attempting to repeat them in detail, and for the general information of the Court at this time, we summarize these grounds as follows :

1. That the Court is without jurisdiction to entertain the charge of contempt against the petitioner or to act or proceed in any manner in the premises.

2. That when the petitioner was examined there was no cause or proceeding pending in the Circuit Court between the United States and the corporations named in the subpoena *duces tecum* or between any other parties, in which the petitioner could be required to give evidence.

3. That the legislative, executive and judicial appropriation act approved February 25th, 1903, granting immunity to witnesses testifying in a proceeding, suit or prosecution under the Anti-Trust Law did not apply to the appellant, particularly because the hearing before the Grand Jury was not, within the meaning of the Anti-Trust Law "such proceeding, suit or prosecution," and that, therefore, the appellant was privileged under the Fifth Amendment of the Constitution from giving oral testimony or producing documentary evidence which might tend to incriminate him.

4. That the said Act of February 25th, 1903, is unconstitutional and void in that it undertakes, in effect, to grant pardons to persons who have been concerned in matters constituting violations of the laws of the United States and is, therefore, in violation of Section 2 of Article 2 of the Constitution.

5. That the Act of February 25th, 1903, is unconstitutional and void, because it seeks to set aside the power of the several States to prosecute and punish, and grant and withhold pardons on account of offenses against their laws, thus usurping the power expressly reserved to the several States by the Tenth Amendment to the Constitution.

6. That the Act of February 25th, 1903, referred to above, contains no requirement that a person should testify, but only grants to him indemnity in case he elects to testify.

7. That the compulsory production of the papers mentioned in the subpoena *duces tecum* would be in effect an unreasonable search therefor and seizure thereof in violation of the appellant's rights under the provisions of the Fourth Amendment of the Constitution, and also of the rights of The American Tobacco Company, the owner of such papers and documents, which were in appellant's custody solely as an officer of that Company.

The foregoing objections were all urged in the case of *Hale*. In the case at bar the following additional objections were urged :

8. That the Grand Jury was without authority in prosecuting the so-called "suit or proceeding" described in the

presentment of the Grand Jury, because it could under the Constitution of the United States only investigate "specific charges against particular persons duly laid before them and "based upon definite allegations," and that the charges originating in the oral statement of the attorney for the Government were not sufficient for that purpose.

9. That the order of the Court directing the petitioner to testify and produce evidence was in effect an effort to compel The American Tobacco Company to be a witness against itself in a criminal case, in violation of the Fifth Amendment of the Constitution, and that the appellant was entitled in behalf of the corporation of which he was an officer, to interpose the privilege under that Amendment.

For answer to all of the foregoing objections, except the ninth, we rely upon our brief heretofore filed in the case of *Hale vs. Henkel*. It seems to be necessary herein to add to that brief only enough to discuss the ninth objection and also to show (1) that if a specific charge against particular persons is necessary to give jurisdiction to a Grand Jury, that requirement has been complied with in this case, and (2) that no objection to the subpoena *duces tecum* served upon the appellant can be made on the ground that it fails to describe specifically the documents called for or that it includes so many as to be burdensome.

FIRST. The protection of the Fourth and Fifth Amendments is based upon the personal privilege of the witness. The objections urged by the witness cannot be relied upon for the benefit of the corporation of which he is an officer.

It has been shown in the *Hale* brief that the Fourth Amendment is inapplicable to the case of the compulsory production of documentary evidence under a subpoena *duces tecum*; or, that if that Amendment could be resorted to at all in such a case it could only be upon the theory that the search or seizure accomplished through the subpoena would incrimi-

nate the witness. The privilege that a witness shall not be compelled to give incriminating evidence is of the same character, whether it arises from the Fourth or from the Fifth Amendment ; and, therefore, when we shall have shown that the privilege cannot be asserted in behalf of a corporation under the Fifth Amendment we shall have disposed of a claim that it may be so availed of under the Fourth Amendment.

Where the question of criminality is not involved it is clearly settled that an officer of a corporation having the books of the company in his custody (and the petitioner here admits that he had the papers and documents in his custody, Petition VII., k, fol. 7) is bound to produce them in obedience to a subpoena *duces tecum* (*Wertheim vs. Continental R'way & Trust Co.*, 15 Fed. Rep., 718, per WALLACE, J., and note).

And the same rule applies, even though the production of the evidence may tend to incriminate the corporation ; one of its officers may not assert in its behalf the privilege secured to *persons* by the Fifth Amendment of the Constitution.

The Fifth Amendment provides that "no person * * * shall be compelled in any criminal case to be a witness against himself ;" and the question is whether a "person" as used in connection with this part of the Amendment is intended to include a corporation.

In determining whether the word "person" in a Statute includes a corporation Mr. Justice STORY said that the "mischief intended to be reached" was to be considered (*United States vs. Amedy*, 11 Wheat., 412), and in *Beaston vs. The Farmers' Bank of Delaware*, 12 Pet., 134, it is said that corporations are only to be considered as persons "when the circumstances in which they are placed are identical with those of natural persons, expressly included in such Statutes."

Applying these rules to the above clause of the Fifth Amendment we find no reason either in the mischief which its history shows that it was designed to reach, or in the circumstances under which it is now sought to be availed of which would extend the word "person" used with reference to the immunity of a witness so as to include a corporation.

A. The privilege embodied in the Amendment is upheld on grounds which vary to some extent ; but all authorities agree that the privilege is personal and is based upon the consideration of the law for the *individual* in his capacity as a *witness*.

In *Brown vs. Walker*, 161 U. S., 596, this Court said :

“ While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition.”

In *Best on Evidence* (9th Ed.), page 113, the author speaks of the privilege as “ personal ” and says that it is “ based on the principle of encouraging all persons to come forward with evidence in courts of justice, by protecting them, as far as possible, from injury or needless annoyance in consequence of so doing.”

See, also, 3 *Taylor on Evidence*, § 1453.

In 1 *Greenleaf on Evidence* (16th Ed.) § 469 *d*, (and cases cited in notes) it is said : “ Being intended solely for the witness's sake, the privilege is his own, and not that of the party; counsel, therefore, will not be allowed to make the objection.”

See, also,

Commonwealth vs. Shaw, 4 Cush., 594.

Phillipps on Evidence (4th Am. Ed.), p. 935.

In *Starkie on Evidence*, 10th Am. Ed. 4, it is said :

" Upon a principle of humanity, as well as of policy every witness is protected from answering questions by doing which he would criminate himself. Of policy, because it would place the witness under the strongest temptation to commit the crime of perjury; and of humanity, because it would be to extort a confession of truth by a kind of duress, every species and degree of which the law abhors."

In *Wigmore on Evidence*, § 2263 (page 3123), it is said :

" Such, too, is the inference from the policy of the privilege as a defensible institution (*ante*, § 2251); that is to say, it exists mainly in order to stimulate the prosecution, to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions."

Mr. Wigmore has shown in a very learned review of the historical origin of the privilege that in England both in the ecclesiastical and common law courts it arose from considerations based solely upon the situation of the individual in his capacity as a witness (§ 2250).

In *State vs. Wentworth*, 65 Maine, 234, 241, Chief Justice APPLETON said that it is the " privilege of the witness alone. * * * The interests of justice would be little promoted by its enlargement." A party to the action having objected, the Court held that only the witness could object, and added : " The privilege, it must be borne in mind, is purely personal."

JESSEL, M. R., in *Reynolds vs. Reynolds* (1882), 15 Cox. Cr., 108, 115, said :

" Perhaps our law has gone even too far in that direction; and, without impugning the policy of the law, there certainly must be a larger policy, which requires a person to answer, where the judge thinks that he is not *bona fide* objecting with the view of claiming the privilege to protect himself, but to prevent other parties getting that testimony which is necessary for the purposes of justice."

In *Bartlett vs. Lewis*, 12 C. B. (N. S.) 249, 265, it is said that the privilege is to protect an innocent witness from the danger of a wrongful conviction.

These authorities, it will be seen, give various reasons for the existence of the rule. But, whether the basis for the privilege be that a witness should not be placed at the disadvantage of being led, through confusion, or ignorance, or anxiety, to make ambiguous or suspicious statements; or whether the rule was adopted to avoid the demoralizing effect on the administration of justice of a possible resort to brow-beating and abuse, and finally to some form of torture; or whether it was designed to avoid perjury on the part of the most interested party; or, finally, whether the privilege is extended to encourage persons to come forward and testify—in any case it is quite clear that the privilege is purely *personal* and is based upon the consideration of the law for the witness as an *individual*.

B. Every consideration that arises from conditions of modern civilization requires that the rule should not be extended further than is necessary to accomplish its original purpose of caring for the personal rights of individuals. This was the view of Judge APPLETON and of JESSEL, M. R., in the cases referred to above. And Mr. Wigmore comments upon the danger of extending the rule as follows (p. 3101) :

“ In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish. * * * Indirectly and ultimately it works for good,—for the good of the innocent accused and of the community at large. But directly and concretely it works for ill,—for the protection of the guilty and the consequent derangement of civic order. * * * (p. 3102). The privilege therefore should be kept within limits the strictest possible. A multiplicity of statutes have shown how seriously it is felt to block the investigation and punishment of crime. Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy.”

Again he says, (page 3107) :

"To invoke the sentiments of lofty indignation and of
 "courageous self-respect against the arbitrary methods
 "of royal tyrants and religious bigots, holding an inquisi-
 "tion to enforce cruel decrees of the prerogative, and
 "torturing their victims with rack and stake, is fitting and
 "laudable, and moves men with a just sympathy. But to
 "apply the same terms to the orderly, everyday processes
 "of the witness-stand, in a community governing itself
 "in freedom by the will of the majority and having on
 "its statute-book no law which was not put there by it-
 "self and cannot be repealed to-morrow,—a community,
 "moreover, cursed above others, by constant evasion of
 "the law and by over-laxity of criminal procedure,—this
 "is to maltreat language, to enervate virile ideas, to
 "abuse true sentiment, to degrade the Constitution, and
 "to make hopeless the correct adjustment of the best
 "motives of human nature to the facts of life."

Judge Thompson, in 5 Cr. L. Mag., 182, after pointing out that the "maxim originally meant that no one should be compelled, *by torture*, to criminate himself," says: "But such a maxim has no place in an enlightened and humane system of jurisprudence. We have outgrown it."

The privilege has become deeply fixed in our system of jurisprudence. It will never be abolished. But it is equally certain that the progress of Anglo-Saxon civilization and the enlightened administration of justice in our courts have made it less and less necessary for the protection of the rights of persons; and every consideration of a proper protection of the body politic demands that the privilege should not be extended beyond the limits which are to be fixed by reference to its historical origin; and this, as we have already shown, would confine the beneficent protection of the privilege to witnesses in their personal and not their representative capacity.

C. While sporadic cases look in a different direction, there have been a number of well-considered decisions, both in this

country and in England, in which the Courts have refused to permit the privilege to be asserted by an officer or employee in behalf of a corporation of which he is the representative.

In *New York Life Ins. Co. vs. People*, 195 Ill., 430, the agent of an insurance company was permitted to testify in a suit for the recovery of a statutory penalty, to facts showing the performance by the corporation of the act prohibited by the statute. The Court held that this was not error, saying (p. 432) :

" If the privilege invoked be applicable to such case,
 " it is a personal one, and inasmuch as the witness did
 " not himself claim the privilege, the company cannot
 " do so, and it is the only appellant here."

In *Wigmore on Evidence*, § 2259 (page 3115), it is said :

" It is obvious that the criminal act of a *third person*
 " cannot be the subject of privilege for the claimant.
 " It is also plain, on the other hand, that a *corporation*,
 " when discovery is sought from it as such, is to be
 " equally protected from disclosure, so far as it is capable
 " of committing a criminal act. What is the effect of
 " these two premises upon the questions that arise when
 " discovery is sought from an *officer* or *employee* of a cor-
 " poration—in the usual case, by a demand for the pro-
 " duction of the corporate books ?

" In the first place, the employee or officer cannot
 " refuse to produce on the ground that the disclosure
 " would affect the corporation. On the other hand, where
 " the corporate misconduct involves also the claimant's
 " misconduct, or where the document is in reality the
 " personal act of the claimant, though nominally that of
 " the corporation, its disclosures are virtually his own,
 " and to that extent his privilege protects him from pro-
 " ducing them."

In *re Moser*, 101 N. W. Reporter, 591, the Court, speaking of the privilege, said :

" It gives him (the witness) no right to attempt to
 " avert real danger from others, no matter how closely
 " he may be associated with them. Unless the answer
 " to the question may tend to criminate himself, he must
 " answer whatever the consequence may be to others ;
 " otherwise the administration of justice would be
 " seriously obstructed."

In the case of *In re Peasley*, 44 Fed. Rep., 271, the petitioner had been summoned before the Grand Jury to give evidence relative to a proceeding under the Interstate Commerce Act on account of alleged violation by one Millett, general agent of the C. B. & Q. Railroad. The subpoena *duces tecum* had been served upon him ordering him to bring certain documents. This he refused to do. Judge GRESHAM, in the Circuit Court, Northern District of Illinois, held that the District Court properly adjudged Peasley in contempt. The petitioner averred that the Fourth and Fifth Amendments justified his attitude before the Grand Jury. The Court said, on page 275 :

" If a witness cannot claim the privilege for the
 " benefit of himself he cannot claim it for the benefit of
 " another * * *."

In *U. S. Express Company, Iowa Railroad Company and A. W. Frazier vs. Henderson*, Judge, 69 Iowa, 40, Frazier had been ordered by a subpoena of the Grand Jury to produce before it certain books of the Express Company and the Iowa Central Railroad Company. He refused to produce the books because they would incriminate his employers who were corporations. The Court adjudged Frazier guilty of contempt, and he filed a writ of *certiorari* to the Supreme Court.

The Court said, on page 41, by ADAMS, Ch. J. :

" We think that the Court was right in adjudging
 " Frazier to be in contempt. The only question raised
 " is as to whether it was the privilege of the witness to
 " refuse to produce the books under the section of the
 " Code above cited.

* * * * *

" If it had been claimed that the books called for
 " tended to render the witness criminally liable, it may

" be that he could not properly be required to produce
 " them. But the claim is simply that they tended to
 " render the witness' employers criminally liable. The
 " case, it seems to us, is not different from any other
 " where a witness is asked to produce a book or paper
 " of his employer. If the book or paper is not within
 " his control, that, of course, would be sufficient reason
 " for not producing it. But the refusal in this case is
 " not based upon that ground. It is based upon the
 " identity of the witness with his employers. But the
 " fact the employers had taken on a corporate character
 " did not identify with themselves an employee to any
 " greater extent than any employee is identified with his
 " employer."

Gibbons vs. The Company of Proprietors of the Waterloo Bridge and William Bayley, their chief clerk, 5 Price, 491 (decided in 1818) was a bill filed by the plaintiff praying a discovery. The defendants demurred to the bill, showing that it appeared by the bill that if the defendants were guilty of certain irregularities they would be obliged to pay a penalty and forfeiture. The defendants' clerk was not one who would have been liable to pay a forfeiture, but he demurred to the bill on the ground that his answer could not be read in evidence against the other defendants, that is, he could not incriminate them. The Court dismissed the demurrer on the ground that he had no right to demur on the ground that he would incriminate others and the demurrer was bad for joining him. The Court said, on page 493:

" I never knew an instance of a clerk demurring to
 " a bill of this sort. * * * I have no difficulty in
 " saying that the demurrer cannot be maintained, for it
 " is clear that the clerk and the defendants cannot de-
 " mur on the ground that his principals are liable to
 " penalties and his answer could not be read against
 " them."

(NOTE. In this case the principal mentioned was a corporation.)

Rex vs. Parnell, Wilson, 239, and *Rex vs. Cornelius*, referred to in the *Gibbons* case, were cited by counsel below against the principle established by the cases we have just cited. But they have no such tendency. For in both of those cases it will be found, upon an analysis of the opinions, that the corporate misconduct sought to be proven by the witness also involved the misconduct of the witnesses themselves. In the *Cornelius* case the document which it was sought to obtain was in reality the personal act of the witness, though nominally that of the corporation; and the effort in both cases was to seek to elicit testimony from the witness which would have criminated him. The *Queen vs. Granatelli*, 7 State Trials (N. S.), 986, was a similar case.

D. An officer asserting the privilege against incrimination in behalf of a corporation, in fact asserts it for the benefit of other persons; and this the law will not permit (*Wigmore on Evidence*, § 2259; *Elliott on Evidence*, § 1007, and cases cited in notes). It is claimed, however, that an officer is identified with the corporation, and that, therefore his assertion of the privilege is in effect the act of the corporation. In relation to some kinds of acts, this is undoubtedly true; for a corporation can only act through its officers. But there is no sound reason for resorting to this principle where a corporation has been guilty of a violation of the criminal law and is seeking to avoid the consequences. A corporation can suffer no criminal penalty or forfeiture except by loss of property. If it pays a fine or a penalty, its assets are reduced. But in any loss of property thus caused, the stockholders or members of the corporation are the ones who really suffer. Therefore, if an officer of a corporation is permitted to assert the privilege under the Fifth Amendment in behalf of the corporation, he is really asserting it not in behalf of that artificial body, but rather for the benefit of the individual stockholders.

In the case of a co-partnership there is a legal entity independent of the individual partners. Each partner may represent the firm, and while a co-partnership may not, like a corporation, be subjected to a criminal penalty or forfeiture, yet if as a co-partnership it has been guilty of wrong doing, and has suffered a penalty or forfeiture, the loss will ultimately

fall upon its members exactly as it would in the case of a corporation. Notwithstanding this, any partner can be compelled to produce incriminating evidence against his copartners. But if these same individuals should adopt a corporate organization, they could, upon the theory now advanced, use the privilege of the Fifth Amendment to escape the penalty of their unlawful acts merely because they had interposed between themselves and one of their number called as a witness, an artificial form of organization. If the framers of the Constitution had intended to bring about such a result surely they would have used language more appropriate for the purpose.

It was long ago held (*Banks vs. Deveaux*, 5 Cranch, 61), that, in order to sustain the jurisdiction of a Federal Court on the ground of diverse citizenship, the Court would look behind the artificial form of a corporation and "contemplate it more substantially" by ascertaining the citizenship of its members. And in the *Northern Securities* case this Court refused to permit the consequences of a violation of the Interstate Commerce Law to be avoided by the organization of the New Jersey corporation, rejected the technical argument that the corporation had the legal power and authority, under the law of New Jersey, to do what it was attempting to do, and dealt with the corporation as a mere instrumentality for carrying out a combination, which was in violation of Federal law. There is no more reason here why the Court should extend the significance of the language of the Fifth Amendment beyond the scope and purpose of the privilege which it was designed to perpetuate by adopting a construction which would enable a number of individuals, merely by assuming a corporate form, to surround their illegal transactions with secrecy which they could not otherwise secure.

In *Bank of Augusta vs. Earle*, 13 Peters, 586, it was claimed that where the members of a corporation were citizens of one State, the corporation could go into another State and there enjoy the "privileges and immunities" which the members would have enjoyed if they had not associated themselves in corporate form, and that, to sustain such a constitutional right, the Court should look behind the artificial form and protect the members of the corporation as "citizens" and the real parties in interest. But the Court said that that would

be giving to individuals an advantage *without subjecting them to the liabilities which, by adopting the corporate form, they escaped*, and that they would thus enjoy "far higher and greater privileges" than were enjoyed by the citizens of the State itself (see, also, *Paul vs. Virginia*, 8 Wallace, 168; *Pembina Consolidated Mining Co. vs. Pennsylvania*, 125 U. S., 181). There is an analogy in the case at bar to the situation in the *Earle* case; for here individuals, by resorting to a corporate form, are claiming an immunity from a disclosure by their officers of the business affairs of the members which the latter would not have enjoyed in their individual capacity, and which neither a copartnership nor an unincorporated association nor an individual would be permitted to enjoy. And if the claim be conceded, the representatives of a great corporation most familiar with its affairs could check the investigation of any illegal transaction by which it might seek to oppress and destroy copartnerships and individual merchants who enjoy no vicarious advantage under the Fifth Amendment. The Court should "contemplate" that situation "substantially" enough to look behind the corporate form and discover that the members of the artificial entity are the persons who are really benefited by the assertion of the sacred privilege against self-incrimination, and that they are enjoying "far higher and greater privileges" than are enjoyed by those who have not resorted to such an organization.

SECOND. The complaint or charge against The American Tobacco Company and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, made in behalf of the United States by the Assistant District Attorney, was sufficient to justify the Grand Jury in investigating it by taking evidence.

We think that this point is sufficiently covered by what has been said in the First Point, II. (p. 33), of the Brief in behalf of the United States in the case of *Hale vs. Henkel*, where we pointed out that it is not necessary that there

should be a specific charge against a particular person in order to give the Grand Jury power to proceed. But if it should be considered that our contention in that case was too broad, the additional particulars in the charge or complaint made herein have avoided all possible objection.

The charge or complaint was "duly made and presented" to the grand jury by an officer of the Government in attendance before it. It was made before the subpoena *duces tecum* was served. It charged the defendants with violations of the Anti-Trust Law (1) in making on about September 27th, 1902, an agreement in restraint of trade between the several States, and also between this country and foreign countries; (2) in carrying out since said September 27, 1902, the terms of said agreement; (3) in attempting on or about said September 27th, 1902, and continuously ever since, to monopolize trade and commerce among the several States; and (4) in combining and conspiring on or about September 27th, 1902, and ever since, to monopolize the trade and commerce among the several States, and in carrying out such combination and conspiracy (pages 7 and 8).

Here is a charge defining the character of the offense and the date of its commission. It did not have the technical accuracy of an indictment; but it was sufficient (1) to enable the Grand Jury and, on objection, the Court, to determine whether any evidence called for was material and competent, and (2) to enable the witness to exercise his constitutional rights; and, as we have shown in the *Hale* brief, if any charge is necessary, all reasonable requirements have been complied with when the charge is specific enough for these purposes.

It is immaterial that the charge was oral—indeed it does not appear that it was not in writing. If it appears on the records of the Grand Jury, that is sufficient; for it is not to be filed for any purpose and can have no use except to guide the Grand Jury in the investigation. No answer can be made. If an indictment follows the complaint becomes unimportant.

The charge was "duly" made. There has never been any technical practice (except in the case of a private prosecutor who submitted an engrossed indictment) as to the form of a complaint. Being presented by the public prosecutor verification could not be necessary. He could not be sued for ma-

licious prosecution or be made chargeable with costs; and thus the two principal reasons for the technical requirements where a private prosecutor presented a bill of indictment, are absent.

Finally, the Court in directing the witness to produce the evidence, adopted and approved the charges as its own and it was as if it had originally committed them "in charge."

The charge or complaint was clearly sufficient.

THIRD. The subpoena duces tecum was framed in compliance with all technical requirements of the law.

The documents to be produced were described in the subpoena *duces tecum* by reference to date and parties. The witness stated that the papers called for were in his custody (fol. 26). It cannot therefore be urged as it was in the *Hale* case that there is any lack of definiteness in the description of the papers. And as only three agreements are called for there is no ground for claiming that an undue search is to be made among the papers of the American Tobacco Company.

That the compulsion of the subpoena does not amount to an unreasonable search or seizure under the Fourth Amendment has been sufficiently shown in the Second Point in our Brief in the *Hale* case.

FOURTH. The order of June 14th, 1905, should be affirmed.

WILLIAM H. MOODY,
Attorney-General.

HENRY W. TAFT,
FELIX H. LEVY,
Special Assistants to the
Attorney-General.

Supreme Court of the United States.

No. 340.—OCTOBER TERM, 1905.

Edwin F. Hale, Appellant,	}	Appeal from the Circuit Court of the United States for the Southern District of New York.
vs.		
William Henkel, United States Marshal.		

[March 12, 1906.]

This was an appeal from a final order of the Circuit Court made June 18, 1905, dismissing a writ of *habeas corpus* and remanding the petitioner Hale to the custody of the marshal.

The proceeding originated in a *subpoena duces tecum*, issued April 28, 1905, commanding Hale to appear before the grand jury at a time and place named, to "testify and give evidence in a certain action now pending . . . in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company on the part of the United States, and that you bring with you and produce at the time and place aforesaid":

1. All understandings, agreements, arrangements, or contracts, whether evidenced by correspondence, memoranda, formal agreements, or other writings, between MacAndrews & Forbes Company and six other firms and corporations named, from the date of the organization of the said MacAndrews & Forbes Company.

2. All correspondence by letter or telegram between MacAndrews & Forbes Company and six other firms and corporations.

3. All reports made or accounts rendered by these six companies or corporations to the principal company.

4. Any agreements or contracts or arrangements, however evidenced, between MacAndrews & Forbes Company and the Amsterdam Supply Company or the American Tobacco Company or the Continental Company or the Consolidated Tobacco Company.

5. All letters received by the MacAndrews & Forbes Company since the date of its organization from thirteen other companies named, located in different parts of the United States, and also copies of all correspondence with such companies.

Petitioner appeared before the grand jury in obedience to the subpoena, and before being sworn asked to be advised of the nature of the investigation in which he had been summoned; whether under any statute of the United States, and the specific charge, if any had been made, in order

that he might learn whether or not the grand jury had any lawful right to make the inquiry, and also that he be furnished with a copy of the complaint, information or proposed indictment upon which they were acting; that he had been informed that there was no action pending in the Circuit Court as stated in the subpoena, and that the grand jury was investigating no specific charge against any one, and he therefore declined to answer: First, because there was no legal warrant for his examination, and, second, because his answers might tend to incriminate him.

After stating his name, residence and the fact that he was secretary and treasurer of the MacAndrews & Forbes Company, he declined to answer all other questions in regard to the business of the company, its officers, the location of its office, or its agreement or arrangements with other companies. He was thereupon advised by the Assistant District Attorney that this was a proceeding under the Sherman Act to protect trade and commerce against unlawful restraint and monopolies; that under the act of 1903, amendatory thereof, no person could be prosecuted or subjected to any penalty or forfeiture on account of any matter or thing concerning which he might testify or produce documentary evidence in any prosecution under said act, and that he thereby offered and assured appellant immunity from punishment. The witness still persisted in his refusal to answer all questions.

He also declined to produce the papers and documents called for in the subpoena:

First. Because it would have been a physical impossibility to have gotten them together within the time allowed.

Second. Because he was advised by counsel that he was under no legal obligations to produce anything called for by the subpoena.

Third. Because they might tend to incriminate him.

Whereupon the grand jury reported the matter to the Court, and made a presentment that Hale was in contempt, and that the proper proceedings should be taken. Thereupon all the parties appeared before the Circuit Judge, who directed the witness to answer the questions and produce the papers. Appellant still persisting in his refusal, the Circuit Judge held him to be in contempt, and committed him to the custody of the marshal until he should answer the questions and produce the papers. A writ of *habeas corpus* was thereupon sued out, and a hearing had before another Judge of the same Court, who discharged the writ and remanded the petitioner.

Mr. Justice BROWN delivered the opinion of the Court.

Two issues are presented by the record in this case, which are so far distinct as to require separate consideration. They depend upon the

applicability of different provisions of the Constitution, and, in determining the question of affirmance or reversal, should not be confounded. The first of these involves the immunity of the witness from oral examination; the second, the legality of his action in refusing to produce the documents called for by the *subpœna duces tecum*.

1. The appellant justifies his action in refusing to answer the questions propounded to him, 1st, upon the ground that there was no specific "charge" pending before the grand jury against any particular person; 2d, that the answers would tend to criminate him.

The first objection requires a definition of the word "charge" as used in this connection, which it is not easy to furnish. An accused person is usually charged with crime by a complaint made before a committing magistrate, which has fully performed its office when the party is committed or held to bail, and is quite unnecessary to the finding of an indictment by a grand jury; or by an information of the District Attorney, which is of no legal value in prosecutions for felony; or by a presentment usually made, as in this case, for an offense committed in the presence of the jury; or by an indictment which, as often as not, is drawn after the grand jury has acted upon the testimony. If another kind of charge be contemplated, when and by whom must it be preferred? Must it be in writing, and if so, in what form? Or may it be oral? The suggestion of the witness that he should be furnished with a copy of such charge, if applicable to him is applicable to other witnesses summoned before the grand jury. Indeed, it is a novelty in criminal procedure with which we are wholly unacquainted, and one which might involve a betrayal of the secrets of the grand jury room.

Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration. There was much propriety in this, as the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.

We are pointed to no case, however, holding that a grand jury cannot proceed without the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in *Rex v. Shaftsbury*, (8 Howell's State Trials, 769,) indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given to you in charge, as of all other matters, and things as shall come to your own

knowledge touching this present service," etc. This oath has remained substantially unchanged to the present day. There was a difference, too, in the nomenclature of the two cases of accusations by private persons and upon their own knowledge. In the former case their action was embodied in an indictment formally laid before them for their consideration; in the latter case, in the form of a presentment. Says Blackstone in his Commentaries, Book IV, page 301 :

"A presentment, properly speaking, is a notice taken by a grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the King, as the presentment of a nuisance, a libel, and the like; upon which the officer of the Court must afterwards frame an indictment, before the party presented can be put to answer it."

Substantially the same language is used in 1 Chitty Crim. Law, 162.

In *United States v. Hill*, (1 Brock. 156,) it was indicated by Chief Justice Marshall that a presentment and indictment are to be considered as one act, the second to be considered only as an amendment to the first, and that the usage of this country has been to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings.

In a case arising in Tennessee the grand jury, without the agency of the District Attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition. Mr. Justice Catron sustained the legality of the proceeding and compelled the witnesses to answer. His opinion is reported in Wharton's Criminal Pleading and Practice (8th ed.) section 337. He says: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime." His charge contains a thorough discussion of the whole subject.

While presentments have largely fallen into disuse in this country, the practice of grand juries acting upon notice, either of their own knowledge or upon information obtained by them, and incorporating their findings in an indictment, still largely obtains. Whatever doubts there may be with regard to the early English procedure, the practice in this country, under the system of public prosecutions carried on by officers of the State appointed for that purpose, has been entirely settled since the adoption of the Constitution. In a lecture delivered by Mr. Justice Wilson of this Court, who may be assumed to have known the current practice, before the students of the University of Pennsylvania, he says (Wilson's Works, vol. II, page 213):

"It has been alleged, that grand juries are confined, in their inquiries, to the bills offered to them, to the crimes given them in charge, and to the evidence brought before them by the prosecutor. But these conceptions are much too contracted; they present but a very imperfect and unsatisfactory view of the duty required from grand jurors, and of the trust reposed in them. They are not appointed for the prosecutor or for the court; they are appointed for the government and for the people; and of both the government and people it is surely the concernment that, on one hand, all crimes, whether given or not given in charge, whether described or not described with professional skill, should receive the punishment, which the law denounces; and that, on the other hand, innocence, however strongly assailed by accusations drawn up in regular form, and by accusers, marshalled in legal array, should, on full investigation, be secure in that protection, which the law engages that she shall enjoy inviolate.

"The oath of a grand jurymen—and his oath is the commission under which he acts—assigns no limits, except those marked by diligence itself, to the course of his inquiries: Why, then, should it be circumscribed by more contracted boundaries? Shall diligent inquiry be enjoined? And shall the means and opportunities of inquiry be prohibited or restrained?"

Similar language was used by Judge Addison, President of the Court of Common Pleas, in charging the grand jury at the session of the Common Pleas Court in 1791:

"If the grand jury, of their own knowledge, or the knowledge of any of them, or from the examination of witnesses, know of any offense committed in the county, for which no indictment is preferred to them, it is their duty, either to inform the officer, who prosecutes for the State, of the nature of the offense and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given them, it is their duty to give such information of it to the Court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment."

The practice then prevailing, with regard to the duty of grand juries, shows that a presentment may be based not only upon their own personal knowledge, but from the examination of witnesses.

While no case has arisen in this Court in which the question has been distinctly presented, the authorities in the State Courts largely preponderate in favor of the theory that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment, or other charge previously laid before them. An analysis of cases approving of this method of procedure would unduly burden this opinion, but the following are the leading ones upon the subject: *Ward v. State*, 2 Mo. 120; *State v. Terry*, 30 Mo. 368; *Ex parte Brown*, 72 Mo. 83; *Commonwealth v. Smyth*, 11 Cushing, 473; *State v. Walcott*, 21 Conn. 272-280; *State v. Magrath*, 44 N. J. L. 227; *Thompson & Merriam on Juries*, Secs. 615-617. In *Blaney v. Maryland*, (74 Md. 153,) the Court said:

"However restricted the functions of the grand juries may be elsewhere, we hold that in this State they have plenary inquisitorial powers, and lawfully themselves, and upon their own motion, may originate charges against offenders, though no preliminary proceedings have been had before a magistrate, and though neither the Court nor the State's Attorney has laid the matter before them."

The rulings of the inferior Federal Courts are to the same effect. Mr. Justice Field, in charging a grand jury in California, (2 Sawy. 667.) said of the grand jury acting upon their own knowledge:

"Not by rumors or reports, but by knowledge acquired from the evidence before you, and from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury."

Similar language was used in *United States v. Kimball*, 117 Fed. Rep. 156-161; *United States v. Reed*, 2 Blatch. 449; *United States v. Terry*, 39 Fed. Rep. 355. And in *Frisbie v. United States*, (157 U. S. 160,) it is said by Mr. Justice Brewer:

"But in this country it is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the suspected party on trial, to direct the preparation of the formal charge or indictment."

There are doubtless a few cases in the State Courts which take a contrary view, but they are generally such as deal with the abuses of the system, as the indiscriminate summoning of witnesses with no definite object in view, and in a spirit of meddlesome inquiry. In the most pertinent of these cases (*In re Leder*, 77 Ga. 143,) the Mayor of Savannah, who was also *ex officio* the presiding Judge of a court of record, was called upon to bring into the Superior Court the "Information Docket" of his Court, to be used as evidence by the State in certain cases pending before the grand jury. It was held "that the powers of the body are inquisitorial to a certain extent is undeniable; yet they have to be exercised within well defined limits. . . . The grand jury can find no bill nor make any presentment except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specified offense."

This case is readily distinguishable from the one under consideration, in the fact that the subpoena in this case did specify the action as one between the United States and the American Tobacco Company and the MacAndrews-Forbes Company; and that the Georgia Penal Code prescribed a form of oath for the grand jury, "that the evidence you shall give the grand jury on this bill of indictment (or presentment, as the case may be, here state the case), shall be the truth," etc. This seems to confine the witness to a charge already laid before the jury.

In *Lewis v. Board of Commissioners*, (74 N. C. 194,) the English practice, which requires a preliminary investigation where the accused can

confront the accuser and witnesses with testimony, was adopted as more consonant to principles of justice and personal liberty. It was further said that none but witnesses have any business before the grand jury, and that the solicitor may not be present, even to examine them. The practice in this particular in the Federal Courts has been quite the contrary.

Other cases lay down the principle that it must be made to appear to the grand jury that there is reason to believe that a crime has been committed, and that they have not the power to institute or prosecute an inquiry on the chance that some crime may be discovered. (*In Matter of Moree*, 18 N. Y. Criminal Rep. 312; *State v. Adams*, 2 Lea, 647, an unimportant case, turning upon a local statute.) In Pennsylvania grand juries are somewhat more restricted in their powers than is usual in other States, (*McCullough v. Commonwealth*, 67 Penn. St. 30; *Rowand v. Commonwealth*, 82 Penn. St. 405; *Commonwealth v. Green*, 126 Penn. St. 531,) and in Tennessee inquisitorial powers are granted in certain cases and withheld in others. (*State v. Adams*, 70 Tenn. 647; *State v. Smith*, 19 Tenn. 99.)

We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the Court has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them. So valuable is this inquisitorial power of the grand jury that, in States where felonies may be prosecuted by information as well as indictment, the power is ordinarily reserved to Courts of empanelling grand juries for the investigation of riots, frauds and nuisances, and other cases where it is impracticable to ascertain in advance the names of the persons implicated. It is impossible to conceive that in such cases the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted. As criminal prosecutions are instituted by the State through an officer selected for that purpose, he is vested with a certain discretion with respect to the cases he will call to their attention, the number and character of the witnesses, the form in which the indictment shall be drawn, and other details of the proceedings. Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the Court, it would doubtless be alert to repress them. While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from

their own observations or upon the evidence of witnesses given before them.

2. Appellant also invokes the protection of the Fifth Amendment to the Constitution, which declares that no person "shall be compelled in any criminal case to be a witness against himself," and in reply to various questions put to him he declined to answer, on the ground that he would thereby incriminate himself.

The answer to this is found in a proviso to the General Appropriation Act of February 25, 1903, (32 Stat. 854-903,) that "no person shall be prosecuted or be subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts," of which the Anti-Trust Law is one, providing, however, that "no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

While there may be some doubt whether the examination of witnesses before a grand jury is a suit or prosecution, we have no doubt that it is a "proceeding" within the meaning of this proviso. The word should receive as wide a construction as is necessary to protect the witness in his disclosures, whenever such disclosures are made in pursuance of a judicial inquiry, whether such inquiry be instituted by a grand jury, or upon the trial of an indictment found by them. The word "proceeding" is not a technical one, and is aptly used by Courts to designate an inquiry before a grand jury. It has received this interpretation in a number of cases. (*Yates v. The Queen*, 14 Q. B. D. 648; *Hogan v. State*, 30 Wis. 428.)

The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution. If the testimony relate to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past criminality, which lingers only as a memory and involves no present danger of prosecution. To put an extreme case, a man in his boyhood or youth may have com-

mitted acts which the law pronounces criminal, but it would never be asserted that he would thereby be made a criminal for life. It is here that the law steps in and says that if the offense be outlawed or pardoned, or its criminality has been removed by statute, the amendment ceases to apply. The extent of this immunity was fully considered by this Court in *Counselman v. Hitchcock*, (142 U. S. 547,) in which the immunity offered by R. S., Section 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this Court in *Brown v. Walker*, (161 U. S. 591,) to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in *Counselman v. Hitchcock* (586), that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith.

We need not restate the reasons given in *Brown v. Walker*, both in the opinion of the Court, and in the dissenting opinion, wherein all the prior authorities were reviewed, and a conclusion reached by a majority of the Court, which fully covers the case under consideration.

The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony or that any serious conflict would arise therefrom. In any event, it is a question relating to the weight of the testimony, which could scarcely be considered in determining the effect of the immunity statute. The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony. It judges of the law by the facts which each party claims, and not by what he may ultimately establish.

The further suggestion that the statute offers no immunity from prosecution in the State Courts was also fully considered in *Brown v. Walker* and held to be no answer. The converse of this was also decided in *Jack v. Kansas*, (199 U.S. 372,) namely, that the fact that an immunity granted to a witness under a State statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this Court and by the Supreme Court of Kansas that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to State prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. (*Queen v. Boyes*, 1 B. & S. 311; *King of Sicilies v. Wilcor*, 7 State Trials [N. S.], 1049, 1068; *State v. March*, 1 Jones [Ga.] 526; *State v. Thomas*, 98 N. C. 599.) The entire question of immunity is also exhaustively treated in Wigmore on Evidence, Secs. 2255-2259.

The case of *United States v. Saline Bank*, (1 Pet. 100,) is not in conflict with this. That was a bill for discovery, filed by the United States against the cashier of the Saline Bank, in the District Court of the Virginia District, who pleaded that the emission of certain unlawful bills took place, within the State of Virginia, by the law whereof penalties were inflicted for such emissions. It was held that defendants were not bound to answer and subject them to those penalties. It is sufficient to say that the prosecution was under a State law which imposed the penalty, and that the Federal Court was simply administering the State law, and no question arose as to a prosecution under another jurisdiction.

But it is further insisted that while the immunity statute may protect individual witnesses it would not protect the corporation of which appellant was the agent and representative. This is true, but the answer is that it was not designed to do so. The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person. A privilege so extensive might be used to put a stop to the examination of every witness who was called upon to testify before the grand jury with regard to the doings or business of his principal, whether such principal were an individual or a corporation. The question whether a corporation is a "person" within the meaning of this amend-

ment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employes. The amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*, and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. As the combination or conspiracies provided against by the Sherman Anti-Trust Act can ordinarily be proved only by the testimony of parties thereto, in the person of their agents or employes, the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the Legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject? Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection. We hold that the questions should have been answered.

3. The second branch of the case relates to the non-production by the witness of the books and papers called for by the *subpoena duces tecum*. The witness put his refusal on the ground, first, that it was impossible for him to collect them within the time allowed; second, because he was advised by counsel that under the circumstances he was under no obligation to produce them; and finally because they might tend to incriminate him.

Had the witness relied solely upon the first ground, doubtless the Court would have given him the necessary time. The last ground we have already held untenable. While the second ground does not set forth with technical accuracy the real reason for declining to produce them, the witness could not be expected to speak with legal exactness, and we think is entitled to assert that the subpoena was an infringement upon the Fourth Amendment to the Constitution, which declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The construction of this amendment was exhaustively considered in the case of *Boyd v. United States*, (116 U. S. 616,) which was an information *in rem* against certain cases of plate glass, alleged to have been imported in fraud of the revenue acts. On the trial it became important to show the quantity and value of the glass contained in a number of cases previously imported; and the District Judge, under Section 5 of the Act of June 22, 1874, directed a notice to be given to the claimants, requiring them to produce the invoice of these cases under penalty that the allegations respecting their contents should be taken as confessed. We held (page

622) "that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment, in all cases in which a search and seizure would be," and that the order in question was an unreasonable search and seizure within that amendment.

The history of this provision of the Constitution and its connection with the former practice of general warrants, or writs of assistance, was given at great length, and the conclusion reached that the compulsory extortion of a man's own testimony, or of his private papers, to connect him with a crime or a forfeiture of his goods, is illegal, (p. 634) "is compelling a man to be a witness against himself, within the meaning of the Fifth Amendment, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the Fourth Amendment.

Subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing separate functions. Thus in the case of *Interstate Commerce Commission v. Brinson*, (154 U. S. 447,) the constitutionality of the Interstate Commerce Act, so far as it authorized the Circuit Courts to use their processes in aid of inquiries before the Commission, was sustained, the Court observing in that connection :

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case."

The case of *Adams v. United States*, (192 U. S. 585,) which was a writ of error to the Supreme Court of the State of New York, involving the seizure of certain gambling paraphernalia, was treated as involving the construction of the Fourth and Fifth Amendments to the Federal Constitution. It was held, in substance, that the fact that papers pertinent to the issue may have been illegally taken from the possession of the party against whom they are offered, was not a valid objection to their admissibility; that the admission, as evidence in a criminal trial of papers found in the execution of a valid search warrant prior to the indictment, was not an infringement of the Fifth Amendment, and that by the introduction of such evidence defendant was not compelled to incriminate himself. The substance of the opinion is contained in the following paragraph. It was contended that "If a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwar-

ranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect."

The Boyd case must also be read in connection with the still later case of *Interstate Commerce Commission v. Baird*, (194 U. S. 25,) which arose upon the petition of the Commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The case grew out of a complaint against certain railway companies that they charged unreasonable and unjust rates for the transportation of anthracite coal. Objection was made to the production of certain contracts between these companies upon the ground that it would compel the witnesses to furnish evidence against themselves in violation of the Fifth Amendment, and would also subject the parties to unreasonable searches and seizures. It was held that the Circuit Court erred in holding the contracts to be irrelevant, and in refusing to order their production as evidence by the witnesses who were parties to the appeal. In delivering the opinion of the Court the Boyd case was again considered in connection with the Fourth and Fifth Amendments, and the remark made by Mr. Justice Day that the immunity statute of 1893 "protects the witness from such use of the testimony given as will result in his punishment for crime or the forfeiture of his estate."

Having already held that by reason of the immunity act of 1903, the witness could not avail himself of the Fifth Amendment, it follows that he cannot set up that amendment as against the production of the books and papers, since in respect to these he would also be protected by the immunity act. We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of Courts to compel, through a *subpoena duces tecum*, the production, upon a trial in Court, of documentary evidence. As remarked in *Summers v. Mosely*, (2 Cr. & M. 477,) it would be "utterly impossible to carry on the administration of justice" without this writ. The following authorities are conclusive upon this question: *Amey v. Long*, 9 East, 473; *Bull v. Loveland*, 10 Pick. 9; *U. S. Express Co. v. Henderson*, 69 Iowa, 40; *Greenleaf on Evidence*, 469a/ ~~Wigmore on Evidence, section 2284.~~ (C)

If, whenever an officer or employe of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter

has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the Legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the Legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as

the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over State corporations.

4. Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an act of Congress passed in the exercise of its constitutional powers, cannot refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. (*Gulf etc. Railroad Company v. Ellis*, 165 U. S. 150, 154, and cases cited.) Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.

We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpœna duces tecum*, against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpœna duces tecum* is far too sweeping in its terms to be regarded as reasonable. It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made, and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that company since its organization from more than a dozen different companies, situated in seven different States in the Union.

If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely

put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. (*Ex parte Brown*, 72 Mo. 83; *Shaftsbury v. Arrowsmith*, 4 Ves. 66; *Lee v. Angas*, L. R. 2 Eq. 59.)

Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.

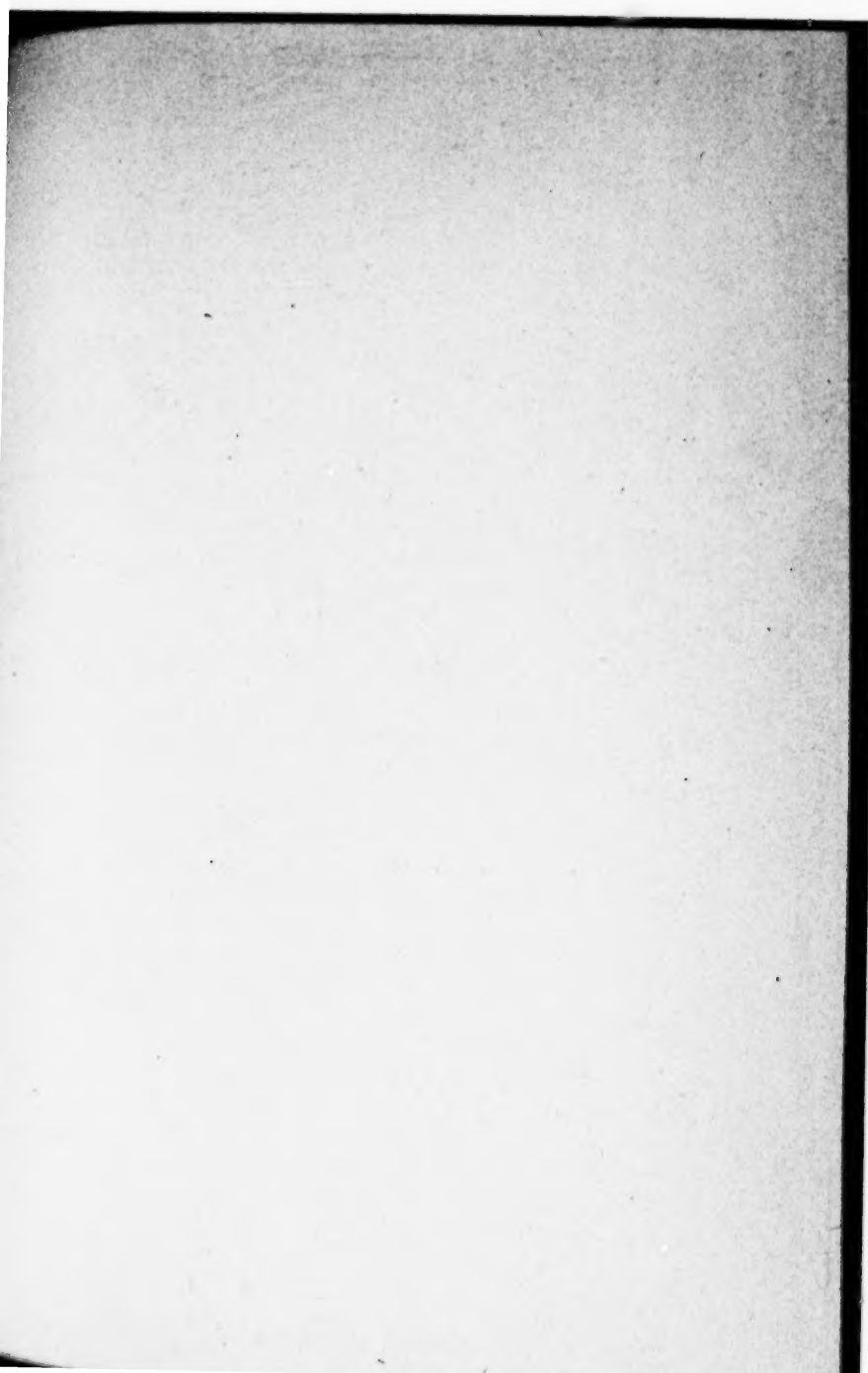
But this objection to the subpoena does not go to the validity of the order remanding the petitioner, which is, therefore,

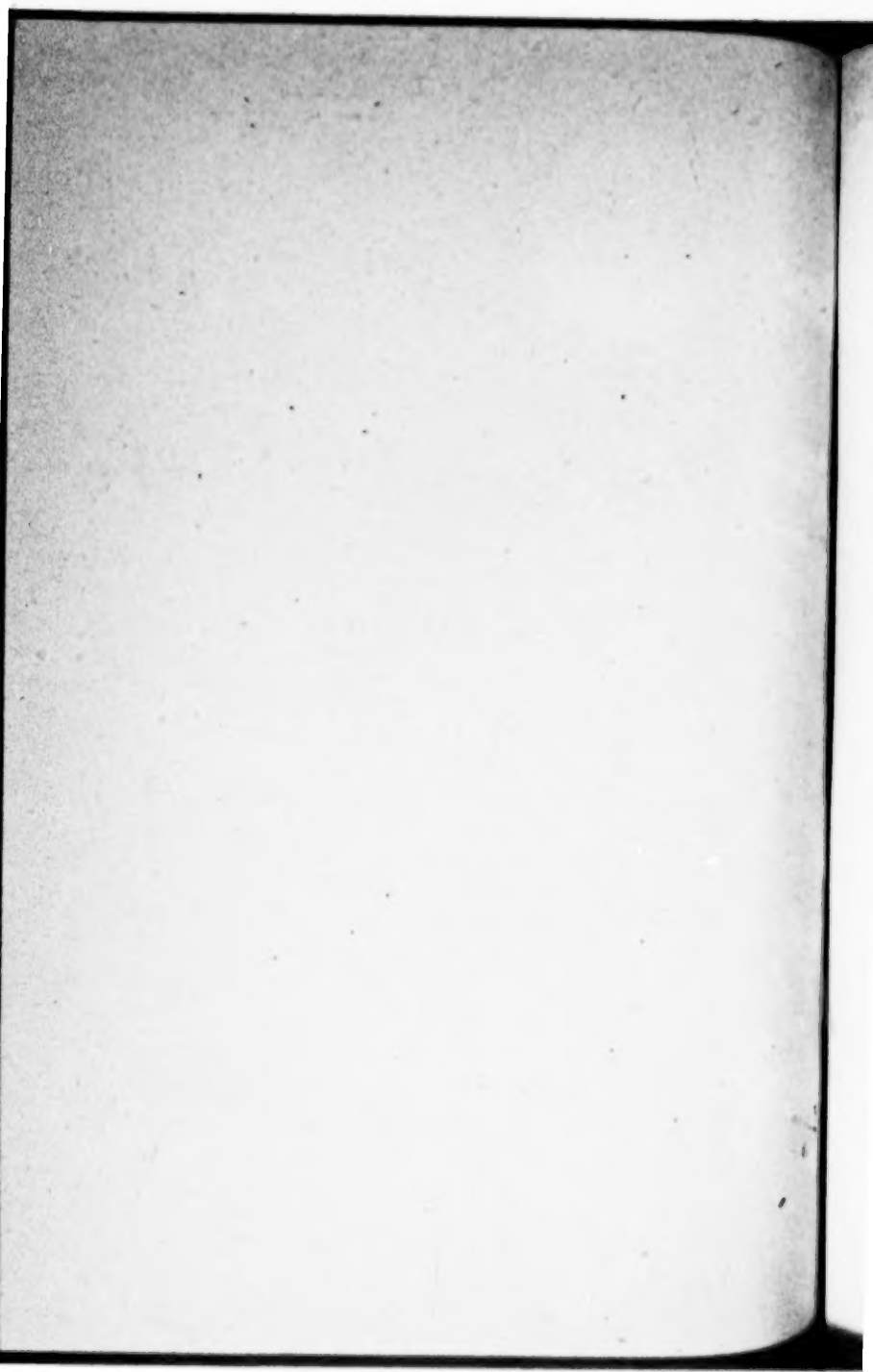
Affirmed.

True copy.

Test :

Clerk Supreme Court, U. S.





Supreme Court of the United States.

No 340.—OCTOBER TERM, 1905.

Edwin F. Hale, Appellant,

vs.

William Henkel, United States Marshal in and
for the Southern District of New York.

} Appeal from the Circuit
Court of the United
States for the Southern
District of New York.

[March 12, 1906.]

Mr. Justice McKENNA, concurring:

I concur in the judgment but not in all the propositions declared by the court. I think the subpoena is sufficiently definite. The charge pending was a violation of the anti-trust act of 1890. The documents and papers sought were the understandings and agreements of the accused companies. That the documents commanded were many or evidenced transactions occurring through a period of time are not circumstances fatal to the validity of the subpoena. If there was a violation of the anti-trust act, that is, combinations in restraint of trade, it would be probably evidenced by formal agreements, but it might also be evidenced or its transactions alluded to in telegrams and letters sent during the time the combination operated. Each telegram, each letter, would contribute proof, and therefore material testimony. Why then should they not be produced? What answer is given? It is said the subpoena is tantamount to requiring all the books, papers and documents found in the office of the McAndrews & Forbes Company, and an embarrassment is conjectured as a result to its business. These, then, I assume, are the detrimental consequences that will be produced by obedience to the subpoena. If such consequences could be granted they are not fatal to the subpoena. But they may be denied. There can be at most but a temporary use of the books, and this can be accommodated to the convenience of parties. It is matter for the court, and we cannot assume that the court will fail of consideration for the interest of parties or subject them to more inconvenience than the demands of justice may require.

I cannot think that the consequences mentioned are important or necessary to the argument. A more serious matter is the application of the Fourth Amendment of the Constitution of the United States.

It is said "a search implies a quest by an officer of the law; a seizure contemplates a forcible dispossession of the owner." Nothing can be more

direct and plain; nothing more expressive to distinguish a subpoena from a search warrant. Can a subpoena lose this essential distinction from a search warrant by the generality or speciality of its terms? I think not. The distinction is based upon what is authorized or directed to be done—not upon the form of words by which the authority or command is given. "The quest of an officer" acts upon the things themselves—may be secret, intrusive, accompanied by force. The service of a subpoena is but the delivery of a paper to a party—is open and above board. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge. This is a safeguard against abuse the same as it is of other processes of the law, and it is all that can be allowed without serious embarrassment to the administration of justice. Of course, it constrains the will of parties, subjects their property to the uses of proof. But we are surely not prepared to say that such uses are unreasonable or are sacrifices which the law may not demand.

However, I may apprehend consequences that the opinion does not intend. It seems to be admitted that many, if not all, of the documents may ultimately be required, but it is said "some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for their production." This intimates a different objection to the order of the court than the generality of the subpoena, and, if good at all, would be good even though few instead of many documents had been required or described ever so specifically. I am constrained to dissent from it. The materiality of his testimony is not open to a witness to determine, and the order of proof is for the court. Besides, if a grand jury may investigate without specific charge, may investigate upon the suggestion of one of its members, must it demonstrate the materiality of every piece of testimony it calls for before it can require the testimony? So limit the power of a grand jury and you may make it impotent in cases where it needs power most and in which its function can best be exercised.

But what does the record show? It shows that Hale refused to give the testimony that, this court says, should have preceded the order under review. He refused to answer what the business of the McAndrew & Forbes Company was or where its office was, or whether there was an agreement with the company and the American Tobacco Company in regard to the products of their respective businesses or whether the company he represented sold its products throughout the United States. The ground of refusal was that there was no legal warrant or authority for his examination, not that the documents or testimony was not material or not shown to be

material. Besides, after objection made to the laying of a foundation, complaint cannot be made that no foundation was laid. And it seems to be an afterthought in the proceedings on *habeas corpus* that the ground objection to examination did not exclusively refer to the want of power in the grand jury.

By virtue of its dominion over interstate commerce Congress has power, the opinion of the court asserts, over corporations engaged in that commerce. And the power is the same as if the corporations had been created by Congress. And yet it is said to be a power subject to the limitation of the Fourth Amendment. To this I am not prepared to assent. I have already pointed out the essential distinction between a *subpoena duces tecum* and a search warrant, and, it may be, the case at bar demands from me no expression of opinion of the Fourth Amendment. And I am mindful, too, of the reservation in the opinion of the court of the power of Congress to require by direct legislation the fullest disclosures of their affairs from corporations engaged in interstate commerce. While recognizing this may be true, and, that until such power is exercised, there may be reasons for holding that corporations are entitled to the protection of the Fourth Amendment, there are reasons against the contention, and I wish to guard against any action which would preclude against their consideration in cases where the Fourth Amendment may be a more determining factor than it is in the case at bar. There are certainly strong reasons for the contention that if corporations cannot plead the immunity of the Fifth Amendment, they cannot plead the immunity of the Fourth Amendment. The protection of both amendments, it can be contended, is against the compulsory production of evidence to be used in criminal trials. Such warrants are used in aid of public prosecutions, (Cooley Constitutional Lim., 6th ed. 364.) and in *Boyd v. United States*, (116 U.S. 616,) a relation between the Fourth Amendment and the Fifth Amendment was declared. It was said the amendments throw great light on each other, "for the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd v. United States* is still recognized, and if its reasoning remains unimpaired, and the purpose and effect of the Fourth Amendment receives illumination from the Fifth, or, to express the idea differently, if

the amendments are the complements of each other, directed against the different ways by which a man's immunity from giving evidence against himself may be violated, it would seem a strong, if not an inevitable conclusion, that if corporations have not such immunity they can no more claim the protection of the Fourth Amendment than they can of the Fifth.

True copy.

Test :

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 340.—OCTOBER TERM, 1905.

Edwin F. Hale, Appellant,	}	Appeal from the Circuit Court of the United States for the Southern District of New York.
vs.		
William Henkel, United States Marshal.		

[March 12th 1906.]

Mr. Justice HARLAN, concurring :

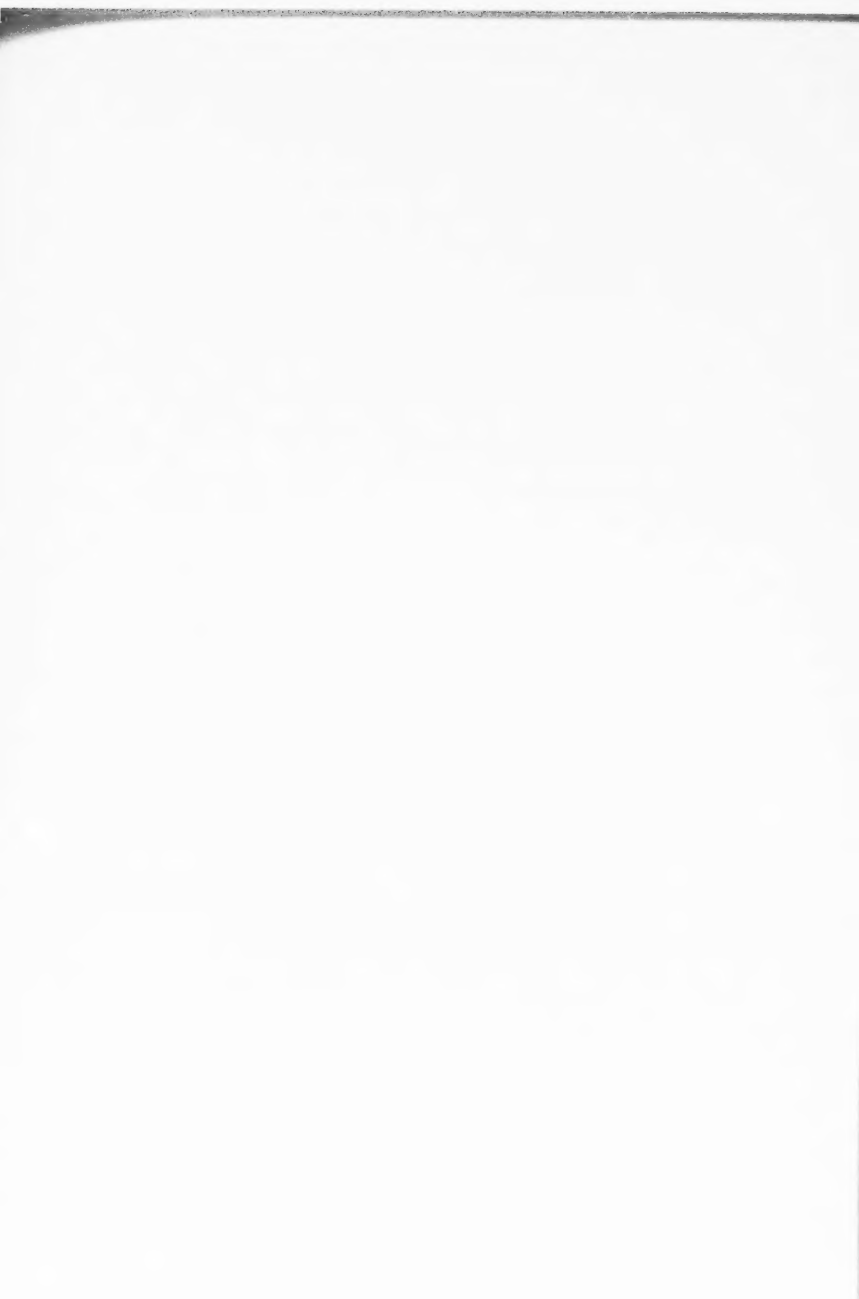
I concur entirely in what is said in the opinion of the court in reference to the powers and functions of the grand jury and as to the scope of the Fifth Amendment of the Constitution. I concur also in the affirmance of the judgment, but must withhold my assent to some of the views expressed in the opinion. It seems to me that the witness was not entitled to assert, as a reason for not obeying the order of the court, that the *subpœna duces tecum* was an infringement of the Fourth Amendment, which declares that "the right of the *People* to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized." It may be, I am inclined to think as a matter of procedure and practice, that the *subpœna duces tecum* was too broad and indefinite. But the action of the court in that regard was, at the utmost, only error, and that error did not affect its jurisdiction to make the order, nor authorize the witness—whose personal rights, let it be observed, were in nowise involved in the pending inquiry—to refuse compliance with the *subpœna*, upon the ground that it involved an unreasonable search and seizure of the books, papers and records of the corporation whose conduct, so far as it related to the Sherman Anti-Trust Act, was the subject of examination. It was not his privilege to stand between the corporation and the Government in the investigation before the grand jury. In my opinion, a corporation—"an artificial being, invisible, intangible and existing only in contemplation of law"—cannot claim the immunity given by the Fourth Amendment; for, it is not a part of the "People," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment. If a contrary view obtains, the power of the Government by its representatives to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will

be greatly curtailed, if not destroyed. If a corporation, when its affairs are under examination by a grand jury proceeding in its work under the orders of the court, can plead the immunity given by the Fourth Amendment against unreasonable searches and seizures, may it not equally rely upon that Amendment to protect it even against a statute authorizing or directing the examination by the agents of the Government creating it, of its papers, documents and records, unless they specify the particular papers, documents and records to be examined? If the order of the court below is to be deemed invalid as an unreasonable search and seizure of the papers, books and records of the corporation, could it be deemed valid if made under the express authority of an act of Congress? Congress could not, any more than a court, authorize an unreasonable seizure or search in violation of the Fourth Amendment. In my judgment when a grand jury seeking, in the discharge of its public duties, to ascertain whether a corporation has violated the law in any particular, requires the production of the books, papers and records of such corporation, no officer of that corporation can rightfully refuse, when ordered to do so by the court, to produce such books, papers and records in his official custody, upon the ground simply that the order was, as to the corporation, an unreasonable search and seizure within the meaning of the Fourth Amendment.

True copy.

Test :

Clerk Supreme Court, U. S.



Supreme Court of the United States.

No. 340.—OCTOBER TERM, 1905.

Edwin F. Hale, Appellant,	}	Appeal from the Circuit Court of the United States for the Southern District of New York.
vs.		
William Henkel, United States Marshal,		

[March 12, 1906.]

Mr. Justice BREWER dissenting.

With what is said in the opinion of the court of the necessity of a "charge," with the proposition that the immunity granted by the Federal statute is sufficient protection against both the nation and the several States, with the holding that the protection accorded by the Fifth Amendment to the Constitution is personal to the individual and does not extend to an agent of an individual or justify such agent in refusing to give testimony incriminating his principal, and also that the *subperna duces tecum* cannot be sustained, I fully agree.

Further, I desire to emphasize certain truths which in this and other cases decided to-day seem to be ignored or depreciated. The immunities and protection of articles 4, 5 and 14 of the amendments to the Federal Constitution are available to a corporation so far as in the nature of things they are applicable. Its property may not be taken for public use without just compensation. It cannot be subjected to unreasonable searches and seizures. It cannot be deprived of life or property without due process of law.

It may be well to compare the words of description in articles 4 and 5 with those in article 14:

"Article 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Article 5. No person . . . shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

"Article 14. Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394, 396, Mr. Chief Justice Waite said :

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

See also *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181 ; *Missouri Pacific Railway Company v. Mackey*, 127 U. S. 205 ; *Minneapolis & St. Louis Railway Company v. Beckwith*, 129 U. S. 26 ; *Charlotte &c. Railroad v. Gibbs*, 142 U. S. 386 ; *Monongahela Navigation Company v. United States*, 148 U. S. 312 ; *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 154, and cases cited ; *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226.

These decisions were under the Fourteenth Amendment, but if the word "person" in that amendment includes corporations, it also includes corporations when used in the Fourth and Fifth Amendments.

By the Fourth Amendment the "people" are guaranteed protection against unreasonable searches and seizures. "Citizens" is a descriptive word ; no broader, to say the least, than "people."

As repeatedly held, a corporation is a citizen of a State for purposes of jurisdiction of Federal courts, and, as a citizen, it may locate mining claims under the laws of the United States, (*McKinley v. Wheeler*, 130 U. S. 630,) and is entitled to the benefit of the Indian Depredation Acts. *United States v. Northwestern Express Company*, 164 U. S. 686. Indeed it is essentially but an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised. As said by Chief Justice Marshall in *Providence Bank v. Billings*, 4 Pet. 514, 562 : "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

United States v. Amedy, 11 Wheat. 392, was the case of an indictment under an act of Congress for destroying a vessel with intent to prejudice the underwriters. The act of Congress declared that "if any person shall . . . wilfully and corruptly cast away . . . any ship or vessel . . . with intent or design to prejudice any person or persons that hath underwritten or shall underwrite any policy," etc. The indictment charged an intent to defraud an incorporated insurance company, and the court held that a corporation is a person within the meaning of the act, saying (p. 412) :

"The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons, is unquestionable. And the citation from

2 Inst. 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz. c. 7, respecting the erection of cottages, where the word used is, 'no person shall,' &c., says, 'this extends as well to persons politic and incorporate, as to natural persons whatsoever.'"

Neither does the fact that a corporation is engaged in interstate commerce in any manner abridge the protection and applicable immunities accorded by the amendments. The corporation of which the petitioner was an officer was chartered by a State, and over it the General Government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either amendment.

It is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a State has chartered it, the power is lodged in the State. If the Nation, then in the Nation, and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

In Angell & Ames on Corporations, 9th ed. chap. 19, secs. 684, 685, the authors say :

"To render the charters or constitutions, ordinances and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation ; or, in other words, to the inspection and control of tribunals recognized by the laws of the land. Civil corporations are visited by the Government itself, through the medium of the courts of justice ; but the internal affairs of ecclesiastical and eleemosynary corporations are, in general, inspected and controlled by a private visitor.

"In this country, where there is no individual founder or donor, the the legislature are the visitors of all corporations founded by them for public purposes, and may direct judicial proceedings against them for abuse or neglects which at common law would cause a forfeiture of their charters."

The matter is discussed in Blackstone's Commentaries, in par. 3, chap. 18, Book 1, and he says :

"I proceed, therefore, next to inquire, how these corporations may be visited. For corporations being composed of individuals, subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil or eleemosynary."

And in respect to civil corporations he adds, same paragraph and chapter (*782):

"The law having by immemorial usage appointed them to be visited and inspected by the King, their founder, in His Majesty's Court of King's Bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority."

In 2 Kent, 300, the author says: "The visitation of civil corporations is by the Government itself, through the medium of the courts of justice."

In *Amherst Academy v. Conelo*, 6 Pick. 427, 433, it was held that:

"Without doubt the legislature are the visitors of all corporations founded by them for public purposes, where there is no individual founder or donor, and may direct judicial process against them for abuses or neglects which by common law would cause a forfeiture of their charters."

The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen States was subject to the visitation of each of those States, and compelled to regulate its actions according to the judgments—perhaps the conflicting judgments—of the several legislatures. The fact that a State corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments. The National Government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the States. *Boyd v. United States*, 116 U.S. 616, arose under the Revenue Acts, and the applicability of the Fourth and Fifth Amendments was sustained. In that case is an elaborate opinion by Mr. Justice Bradley, speaking for the court, in which the origin of the Fourth and Fifth Amendments is discussed, their relationship to each other shown, and the necessity of a constant adherence to the underlying thought of protection expressed in them strenuously insisted upon. I quote his words (p. 635):

"It may be that it (the proceeding in question) is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Finally, as the *subpoena duces tecum* was the initiatory step in the proceedings before the grand jury against this petitioner, as that is the major fact in those proceedings, and as it is agreed that it is not sustainable, it seems to me that the order adjudicating him in contempt should be set aside, and this notwithstanding that subsequently he improperly refused to answer certain questions.

The case is not parallel to that of an indictment in two counts upon which a general judgment is entered, and one of which counts is held good and the other bad, for a writ of *habeas corpus* is not a writ of error, and the order to be entered thereon is for a discharge or a remand to custody. If a discharge is ordered no punishment can be inflicted under the judgment as rendered, and if a new prosecution is instituted containing the good count a plea of former conviction will be a full defense. But in the case at bar an order for a discharge will have no such result. The *habeas corpus* statute (R. S. sec. 761) provides that "the court, or justice, or judge shall proceed in a summary way . . . to dispose of the party as law and justice require." Justice requires that he should not be subjected to the costs of this *habeas corpus* proceeding, or be punished for contempt when he was fully justified in disregarding the principal demand made upon him.

The order of the Circuit Court should be reversed and the case remanded with instructions to discharge the petitioner, leaving to the grand jury the right to initiate new proceedings not subject to the objections to this.

I am authorized to say that the CHIEF JUSTICE concurs in these views.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 341.—OCTOBER TERM, 1905.

William H. McAlister, Appellant,	} Appeal from the Circuit Court of the United States for the Southern District of New York.
vs. William Henkel, United States Marshal.	

[March 12, 1906.]

Mr. Justice Brown delivered the opinion of the Court.

This case involves many of the questions already passed upon in the opinion in *Hale v. Henkel*, differing from that case, however, in two important particulars: First, in the fact that there was a complaint and charge made on behalf of the United States against the American Tobacco Company and the Imperial Tobacco Company under the so-called Sherman Act, and second, that the subpoena pointed out the particular writings sought for, (three agreements,) giving in each case the date, the names of the parties, and, in one instance, a suggestion of the contents.

The witness McAlister, who was secretary and a director of the American Tobacco Company, refused to answer or produce the documents for practically the same reasons assigned by the appellant Hale, demanding to be advised what the suit or proceeding was, and to be furnished with a copy of the proposed indictment. A copy of one of the agreements with three English companies and certified by the Consul General of the United States is contained in the record.

For reasons already partly set forth, we think that the immunity provided by the Fifth Amendment against self-incrimination is personal to the witness himself, and that he cannot set up the privilege of another person or of a corporation as an excuse for a refusal to answer—in other words, the privilege is that of the witness himself, and not that of the party on trial. The authorities are practically uniform on this point. *Commonwealth v. Shaw*, 4 Cush. 594; *State v. Wentworth*, 65 Maine, 234, 241; *Reynolds v. Reynolds*, 15 Cox Criminal Cases, 108, 115. In *New York Life Insurance Co. v. People*, (195 Ill. 430,) the privilege was claimed by a corporation, but the agent of an insurance company was permitted to testify in a suit for the recovery of a statutory penalty to facts showing the performance by the corporation of the act prohibited. ~~An elaborate history~~

~~of this privilege and its limitations is given by Professor Wigmore in his~~

~~recent work on Evidence, sections 2250 to 2259.~~ Indeed, the authorities are numerous to the effect that an officer of a corporation cannot set up the privilege of a corporation as against his testimony or the production of their books.

The questions are the same as those involved in the *Hale* case, without the objectionable feature of the subpoena, and the order of the Circuit Court is, therefore,

Affirmed.

True copy.

Test :

Clerk Supreme Court, U. S.